DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1200
Title: Executive Benefits Insurance Agency, Petitioner
v.
Peter H. Arkison, Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc.
Docketed: April 3, 2013
Linked with 12A831
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (11-35162)
Decision Date: December 4, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 22 2013	Application (12A831) to extend the time to file a petition for a writ of certiorari from March 4, 2013 to April 3, 2013, submitted to Justice Kennedy.
Mar 1 2013	Application (12A831) granted by Justice Kennedy extending the time to file until April 3, 2013.
Apr 3 2013	Petition for a writ of certiorari filed. (Response due May 3, 2013)
May 3 2013	Order extending time to file response to petition to and including May 20, 2013.
May 20 2013	Brief of respondents Peter H. Arkison, Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc. in opposition filed.
Jun 3 2013	Reply of petitioner Executive Benefits Insurance Agency filed.
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Petition GRANTED.
Jul 10 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 9, 2013.
Jul 22 2013	The time to file respondent's brief on the merits is extended to and including November 8, 2013.
Aug 27 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 27 2013	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for petitioner.
Sep 9 2013	Joint appendix filed. (Statement of costs received.)
Sep 9 2013	Brief of petitioner Executive Benefits Insurance Agency filed.
Sep 16 2013	Brief amici curiae of Robert R. McCormick Foundation, et al. filed.
Sep 16 2013	Brief amicus curiae of NVIDIA Corporation in support of neither party filed.
Sep 16 2013	Brief amici curiae of Certain Tousa Defendants filed.

Sep 16 2013	Brief amicus curiae of Business Law Section of the Florida Bar in support of neither party filed.
Sep 16 2013	Brief amicus curiae of Kerr-McGee Corporation filed.
Nov 4 2013	SET FOR ARGUMENT ON Tuesday, Jaunuary 14, 2014.
Nov 5 2013	CIRCULATED
Nov 8 2013	Brief of respondent Peter H. Arkison, Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc. filed. (Distributed)
Nov 12 2013	Brief amici curiae of Professors Richard Aaron, et al. filed. (Distributed)
Nov 14 2013	Brief amicus curiae of National Association of Chapter Thirteen Trustees filed. (Distributed)
Nov 15 2013	Brief amicus curiae of Irving H. Picard, as Trustee of the Substantively Consolidated Estate of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff filed. (Distributed)
Nov 15 2013	Brief amicus curiae of TOUSA Liquidation Trustee filed.
Nov 15 2013	Brief amicus curiae of National Association of Bankruptcy Trustees filed. (Distributed)
Nov 15 2013	Brief amicus curiae of Professors S. Todd Brown, et al. filed. (Distributed)
Nov 15 2013	Brief amicus curiae of Commercial Law League of America filed. (Distributed)
Nov 15 2013	Brief amici curiae of States of New Hampshire, et al. filed. (Distributed)
Nov 15 2013	Brief amicus curiae of American College of Bankruptcy filed. (Distributed)
Nov 15 2013	Brief amicus curiae of the United States filed. (Distributed)
Nov 15 2013	Brief amicus curiae of American Bar Association filed. (Distributed)
Nov 15 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 19 2013	Record from the U.S.C.A. 9th Circuit is electronic and located on PACER. Record from the U.S.D.C. for Western District of Washington is also electronic and located on PACER.
Dec 9 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 9 2013	Reply of petitioner Executive Benefits Insurance Agency filed. (Distributed)
Jan 14 2014	Argued. For petitioner: Douglas Hallward-Driemeier, Washington, D. C. For respondent: John Pottow, Ann Arbor, Mich.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12 1200

Supreme Court, U.S.
FILED
APR 3 - 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Article III of the United States Constitution precludes Congress from assigning certain "core" bankruptcy proceedings involving private state law rights to adjudication by non-Article III bankruptcy judges. Applying *Stern*, the court of appeals for the Ninth Circuit held that a fraudulent conveyance action is subject to Article III. The court further held, in conflict with the Sixth Circuit, that the Article III problem had been waived by petitioner's litigation conduct, which the court of appeals construed as implied consent to entry of final judgment by the bankruptcy court. The court of appeals also held, in conflict with the Seventh Circuit, that a bankruptcy court may issue proposed findings of fact and conclusions of law, subject to a district court's de novo review, in "core" bankruptcy proceedings where Article III precludes the bankruptcy court from entering final judgment. The court of appeals' decision presents the following questions, about which there is considerable confusion in the lower courts in the wake of *Stern*:

1. Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Executive Benefits Insurance Agency (EBIA) was the appellant in the court of appeals. EBIA has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Peter Arkison is the Chapter 7 Trustee of the bankruptcy estate of Bellingham Insurance Agency, Inc. (Bellingham), and was the appellee in the court of appeals.

Aegis Retirement Income Services, Inc., Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce, were co-defendants of EBIA in the adversary proceeding commenced in the bankruptcy court by Arkison as Trustee of Bellingham's estate, but were not subject to the bankruptcy court's judgment that was reviewed by the court of appeals, and were not parties to the proceedings before the court of appeals.

TABLE OF CONTENTS

Opinions below 1
Jurisdiction 1
Constitutional provisions involved 2
Statutory provisions involved 2
Statement of the case 2
A. The bankruptcy court's entry of final judgment against EBIA 3
B. Appellate proceedings in the district court and the court of appeals 4
Reasons for granting the petition 8
I. This Court should resolve the question whether, and under what circumstances, litigant consent can confer on non-Article III judges authority to exercise the judicial power of the United States 10
A. The court of appeals' holding conflicts with a decision of the Sixth Circuit 10
B. Entry of final judgment on a private right of action by a non-Article III bankruptcy judge violates the separation of powers regardless of litigant consent 13
C. Consent is only relevant to an Article III structural analysis to the extent Congress made consent a feature of the statutory scheme, not where it is inferred post-hoc from a litigant's failure to object 18
1. To the extent consent can form a part of the separation-of-powers analysis, it must be central to the statutory scheme 19
2. The court of appeals' decision illustrates the danger of allowing post-hoc findings of implied consent to form

part of the separation-of-powers analysis 21
II. This Court should resolve the conflict among lower courts on whether bankruptcy judges are statutorily authorized to submit proposed findings of fact and conclusions of law in "core" proceedings 25
A. The Ninth Circuit's decision conflicts with a decision of the Seventh Circuit 26
B. The Ninth Circuit's holding is contrary to the text and structure of the statute 27
C. It is for Congress, not the courts, to determine how to address the statutory "gap" revealed by *Stern* 30
III. This Court's review is necessary to resolve tremendous uncertainty in the lower courts following *Stern* 32
Conclusion 34
Appendix A — Court of Appeals Opinion (Dec. 4, 2012) 1a
Appendix B — District Court Opinion (Jan. 21, 2011) 41a
Appendix C — Bankruptcy Court Judgment (May 27, 2010) 53a
Appendix D — Bankruptcy Court Opinion (May 27, 2010) 56a
Appendix E — Order (Nov. 4, 2011) 58a
Appendix F — Order (July 2, 2010) 60a
Appendix G — Order (Mar. 26, 2010) 62a
Appendix H — Statutory provision: 28 U.S. C. 157 ..... 64a
Appendix I — Statutory provision: 28 U.S. C. 158 ..... 68a

Appendix J — Joint status report (Mar. 12, 2010)... 73a
Appendix K — Memorandum in Support of Motion to Vacate Trial Date (Dec. 21, 2009) 77a
Appendix L — Answer (Aug. 1, 2008) 81a

TABLE OF AUTHORITIES

Page(s)

Cases:

BearingPoint, Inc. (In re), 453 B.R. 486 (Bankr. S.D.N.Y. 2011) 33

Commodity Futures Trading Commission v. *Schor*, 478 U.S. 833 (1986) ..... *passim*

Coudert Bros. LLP(In re), No. 11-2785, 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011) 33

Donaldson v. *Ducote*, 373 F.3d 622 (5th Cir. 2004) 22

Duck v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), overruled by, *Executive Benefits Ins. Agency* v. *Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012) 3, 23

Field v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421 (D. Haw. 2011) 31

Freytag v. *Comm'n of Internal Revenue*, 501 U.S. 868 (1991) 14

Geras v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) 14

Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 3, 24

Hartford Underwriters Ins. Co. v. *Union Planters Bank, N. A.*, 530 U.S. 1 (2000) 27

MacDonald v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932) 17

Marshall v. *Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010), aff'd, 131 S. Ct. 2594 (2011) 24

Cases—Continued:

Miranda B. v. *Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) 25

N.L.R.B. v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573 (1961) 30

N. Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 17, 18, 31, 32

Nguyen v. *United States*, 539 U.S. 69 (2003) 14

Ortiz v. *Aurora Health Care (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011) 6, 26

Pacemaker Diagnostic Clinic of Am., Inc. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S 824 (1984) 20, 21, 23

Paloian v. *Am. Express Co. (In re Canopy Financial, Inc.)*, 464 B.R. 770 (N.D. Ill. 2011) ... 31

Peretz v. *United States*, 501 U.S. 923 (1991) 13

Phillips v. *Beierwaltes*, 466 F.3d 1217 (10th Cir. 2006) 22

Robinson v. *Heilman*, 563 F.2d 1304 (9th Cir. 1977) 24

Roell v. *Withrow*, 538 U.S. 580 (2003) 9, 17, 18, 22

Schor v. *Commodity Futures Trading Comm'n*, 740 F.2d 1262 (D.C. Cir. 1984), rev'd, 478 U.S. 833 (1986) 14

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 30

Sheridan v. *Michels (In re Sheridan)*, 362 F.3d 96 (1st Cir. 2004) 23

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) ..... *passim*

Cases—Continued:

Tech. Automation Servs. Corp. v. *Liberty Surplus Ins. Corp.*, 673 F.3d 399 (5th Cir. 2012) 33

Waldman v. *Stone*, 698 F.3d 910 (6th Cir. 2012), cert. denied, 2013 U.S. LEXIS 2333 (Mar. 18. 2013) 10, 11, 12

Webster v. *Fall*, 266 U.S. 507 (1925) 17

Weisfelner v. *Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712 (S.D.N.Y. 2012) 34

Constitution and statutes:

U.S. Const. art. III, § 1, cl. 1 ..... 2, 13

Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. 151 *et seq.*:

28 U.S.C. 157 3

28 U.S.C. 157(b) 7, 23

28 U.S.C. 157(b)(1) 28

28 U.S.C. 157(b)(5) 17

28 U.S.C. 157(c)(1) ..... *passim*

28 U.S.C. 157(c)(2) 20, 23, 28

28 U.S.C. 158 7

28 U.S.C. 158(a) 26, 28

28 U.S.C. 158(d)(2)(A) 26

28 U.S.C. 636(c)(1) 20

28 U.S.C. 636(c)(2) 20

28 U.S.C. 1963 15

Miscellanous:

130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier) 29, 30

Miscellanous—Continued:

Bankruptcy Proceedings (In re), Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012) 32

Black's Law Dictionary (9th ed. 2009) 28

Ralph Brubaker, *The Constitutionality of Litigant Consent*, 32 No. 12 Bankr. L. Letter (Dec. 2012) 33

Erwin Chemerinsky:

Circuit Split Over Parties Expanding A Bankruptcy Court's Power, Daily J. (Feb. 12, 2013) 33

Enormous Confusion, Nat'l L.J. (Aug. 29, 2011) 33

Fed. R. Bankr. P. 7008 20

Fed. R. Bankr. P 7012 20

H.R. Rep. No. 94-1609 (1976) 30

Standing Order of Reference Re: Title 11 (In re) (D. Del. Feb. 29, 2012) 32

Standing Order of Reference Re: Title 11 (In re), No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012) 32

PETITION FOR A WRIT OF CERTIORARI

Petitioner Executive Benefits Insurance Agency (EBIA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–40a) is reported at 702 F.3d 553. The opinion of the district court (App. 41a–52a) is unreported. The opinion of the bankruptcy court (App. 53a–54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2012. On March 1, 2013, Justice Kennedy granted an extension of time to and including April 3, 2013, in which to file a petition for certiorari. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

The notification required by Rule 29.4(b) has been made to the Solicitor General of the United States. Although no court has previously made a certification to the Attorney General pursuant to 28 U.S.C. 2403(a), the United States was informed by the court of appeals of the constitutional issues presented in this case following the decision in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and the United States thereafter participated as amicus curiae in the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, section 1 of the Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art III, § 1.

STATUTORY PROVISIONS INVOLVED

Sections 157 and 158 of Title 28 of the United States Code are reproduced in full in an appendix hereto (App. 64a–72a).

STATEMENT OF THE CASE

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Congress violated Article III when it vested in bankruptcy courts the authority to enter final judgments on certain state-law counterclaims designated as "core" bankruptcy proceedings under Section 157(b)(2) of Title 28. *Id.* at 2620. At the same time, the Court held that proceedings Congress had designated "core" could not simply be recharacterized as "related to" proceedings, in order to avoid the constitutional defect. *Id.* at 2604–2605. *Stern* left open two questions on which the courts of appeals are now divided. First, under what circumstances, if any, can litigant consent cure an otherwise unconstitutional exercise of the judi-

cial power of the United States by a bankruptcy judge? And second, does the grant to bankruptcy judges of authority to "hear and determine" certain proceedings (including proceedings labeled "core") subject to district court appellate review include the authority to issue proposed findings of fact and conclusions of law subject to de novo adjudication by the district court?

A. The Bankruptcy Court's Entry Of Final Judgment Against EBIA

In 2006, Bellingham Insurance Agency, Inc. (Bellingham) declared bankruptcy, filing a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Washington. Respondent Peter H. Arkison (Trustee) was appointed trustee of Bellingham's bankruptcy estate, and later commenced an adversary proceeding against non-creditor EBIA and five other defendants. The bankruptcy court's jurisdiction was invoked under 28 U.S.C. 1334 and 28 U.S.C. 157. Among other claims, the Trustee asserted that EBIA had received fraudulent transfers from Bellingham and that EBIA was liable for Bellingham's debts as a successor corporation. See App. 6a.

At the time the Complaint was filed, binding Ninth Circuit precedent specifically held that final adjudication of fraudulent conveyance actions by bankruptcy courts was consistent with Article III. *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), *overruled by* App 15a. Under *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), however, a defendant in such an action could insist on its right to a jury trial. In its Answer, EBIA demanded a jury trial and expressly indicated that it did not consent to a jury trial before a bankruptcy judge. App. 82a. EBIA renewed its demand for a jury

trial in the district court after the bankruptcy judge set a trial date. App. 77a–80a. The bankruptcy judge referred EBIA's request to the district court, which construed it as motion to withdraw the reference.

In a status report filed with the district court, several parties indicated that the Trustee was about to file a summary judgment motion against EBIA before the bankruptcy court and further requested time to conduct a settlement conference before a bankruptcy judge. App. 74a–75a. EBIA did not join in that status report. App. 76a. Noting that the case was still far from ready for trial, the district court stayed consideration of the motion to withdraw for three months. App. 62a–63a.

While the motion was stayed, the Trustee moved in the bankruptcy court for summary judgment against EBIA on the fraudulent transfer and successor liability causes of action. App. 56a–57a. The bankruptcy judge granted the motion and entered a final, binding judgment against EBIA in the amount of $389,474.36. App. 53a–55a, 57a. The district court thereafter denied EBIA's motion to withdraw the reference and conduct a jury trial for the sole reason that the bankruptcy court had already entered summary judgment against EBIA and no other party sought withdrawal. App. 61a.

B. Appellate Proceedings In The District Court And The Court of Appeals

EBIA appealed the bankruptcy court's final judgment to the district court. The district court indicated that the bankruptcy court's grant of summary judgment was subject to de novo review, but, at the same time, invoked a "substantial evidence" standard in reviewing the bankruptcy court's findings. App. 45a, 50a.

The district court concluded that EBIA had failed to show any error on the part of the bankruptcy court and, on that basis, dismissed EBIA's appeal and affirmed the bankruptcy court's entry of judgment. App. 51a.

EBIA appealed to the Ninth Circuit. After EBIA filed its opening brief, this Court issued its decision in *Stern*, which held that bankruptcy courts lack constitutional authority to enter final judgment in certain "core" proceedings. EBIA thereafter filed a supplemental brief in the court of appeals arguing that, under *Stern*, the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims. App. 7a–8a.

Following oral argument, the court of appeals sua sponte invited amicus briefs on two questions:

> 1) Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance?
>
> 2) If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?

App. 58a–59a. More than a dozen amici, including the United States, filed briefs in response to the court's invitation. App. 3a–4a.

The court of appeals issued its decision on December 4, 2012. Relying on *Stern* and *Granfinanciera*, the court first overruled its decision in *Mankin*, and concluded that a fraudulent conveyance claim against a non-creditor is subject to Article III and cannot consti-

tutionally be assigned by Congress to a bankruptcy court for final adjudication. App. 15a, 23a.

The court of appeals acknowledged that this holding, though required by *Stern*, "create[d] a gap in [the Bankruptcy Code's] statutory framework" because "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." See App. 23a–24a. The court recognized that 28 U.S.C. 157(c)(1) grants bankruptcy judges the authority to issue proposed findings of fact and conclusions of law only in a proceeding that is " 'not a core proceeding,' " and further that a fraudulent conveyance proceeding does not fall within Section 157(c)(1) because it is "core" under the statute. App. 24a. The court of appeals determined that the gap should be filled by reading "the power to 'hear and determine' a proceeding" under Section 157(b)(1) to encompass the "more modest power to submit findings of fact and recommendations of law to the district courts." *Ibid.* It reasoned that Congress intended to vest bankruptcy judges with "as much adjudicatory power as the Constitution will bear." *Ibid.*

The court of appeals acknowledged that the Seventh Circuit had expressed a contrary view in *Ortiz* v. *Aurora Health Care (In re Ortiz)*, 665 F.3d 906, 915 (2011), which indicated that proposed findings of fact and conclusions of law were authorized only in non-core proceedings. The court of appeals declared that it did "not find the *Ortiz* court's analysis of the issue thoroughly reasoned." App. 25a n.8. The court of appeals did not explain how, under its own solution, the district court's "de novo review" of a bankruptcy court in a core proceeding could be reconciled with Section 157(b)'s statement that a bankruptcy court's orders and judg-

ments in core proceedings are reviewable only on "appeal[]" to the district court. 28 U.S.C. 157(b), 158. Nor did the court of appeals address the absence of authority in Section 157(b) for a district court to enter final judgment in core proceedings. *Cf.* 28 U.S.C. 157(c)(1) (specifying that, in any non-core proceeding "any final order or judgment shall be entered by the district judge").

The court of appeals next held that EBIA had "impliedly consented" to adjudication by the bankruptcy judge. App. 30a. It reasoned that a litigant's consent can cure an otherwise unconstitutional exercise of judicial power by a non-Article III bankruptcy judge. App. 26a–29a. The court acknowledged that litigant consent cannot overcome Article III's structural protection of the separation of powers. App. 27a n.9 (citing *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850–851 (1986)). But the court believed that the structural component of Article III is only implicated where "the encroachment or aggrandizement of one branch at the expense of the other is at stake." *Ibid.* (internal quotation marks omitted). The court concluded that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are officers of the district court and are appointed by the Courts of Appeals." *Ibid.* (brackets and internal quotation marks omitted).

The court of appeals concluded that EBIA, through its litigation conduct, had "impliedly consented" to adjudication by a bankruptcy judge. App. 29a–30a. Although EBIA had repeatedly demanded a jury trial before the district court, the court of appeals found that EBIA's failure to object to the bankruptcy court adju-

dicating the Trustee's summary judgment motion amounted to an "elect[ion] not to pursue a hearing in an Article III court." App. 29a. The Ninth Circuit also emphasized that EBIA had not framed its objection in terms of Article III until after this Court's decision in *Stern*, which was after EBIA filed its opening brief in the court of appeals. App. 30a. "Because it waited so long to object, and in light of its litigation tactics," the court held that "EBIA impliedly consented to the bankruptcy court's jurisdiction." *Ibid.* Although the court of appeals faulted EBIA for failing to anticipate this Court's holding in *Stern*, the court of appeals itself was required to overrule binding circuit precedent upholding bankruptcy courts' entry of final judgment in fraudulent conveyance actions. App. 15a (overruling *Mankin*).

On the merits, the court of appeals affirmed the bankruptcy court's grant of summary judgment on the fraudulent conveyance and successor entity claims. App. 34a–39a.

REASONS FOR GRANTING THE PETITION

This petition presents two fundamental questions about the authority of non-Article III bankruptcy judges. The court of appeals' decision creates a clear split with the Sixth Circuit on whether litigants can consent to the exercise of the judicial power of the United States by a non-Article III judge, in the form of entry of a final, enforceable judgment. No decision of this Court has specifically addressed the question whether the structural, separation-of-powers function of Article III permits Congress to reassign the powers of the Judicial Branch as long as the parties consent. Although the court of appeals found support for that proposition

in this Court's decision in *Stern* v. *Marshall*, see App. 33a, that decision suggests the contrary conclusion, stressing that "it does not matter who * * * authorized the [bankruptcy] judge to render final judgments in such proceedings. The constitutional bar remains," 131 S. Ct. 2594, 2619 (2011). This Court's decision in *Roell* v. *Withrow*, 538 U.S. 580 (2003), upon which the court of appeals also relied, did not address the separation-of-powers aspect of Article III. And, in any event, *Roell* construed a statute under which litigants were "made aware of the need for consent and the right to refuse it." *Id.* at 590. Here, by contrast, the statutory scheme does not require consent, and binding circuit precedent denied that EBIA had an Article III right to adjudication by a district judge.

The court of appeals' decision also creates a split with the Seventh Circuit on whether bankruptcy judges have statutory authority to propose findings of fact and conclusions of law in "core" proceedings. *Stern* held that bankruptcy judges lack constitutional authority to enter final judgment against non-creditors in core proceedings asserting private rights of action. But the Bankruptcy Code grants bankruptcy judges authority to issue proposed findings of fact and conclusions of law only in *non*-core proceedings. As a result, lower courts have struggled to determine what authority bankruptcy judges retain in those core proceedings where the constitution precludes the bankruptcy court from entering final judgment. The Ninth Circuit's remedy—allowing bankruptcy judges to issue proposed findings of fact and conclusions of law in core proceedings—is inconsistent with the text and structure of the statute, which assigns no such authority to bankruptcy judges, and which provides only for district court appellate re-

view of bankruptcy court orders and judgments in core proceedings. As this Court has previously held, recalibrating the allocation of authority between bankruptcy courts and district courts in light of a constitutional defect in the statute is the responsibility of Congress, not the federal courts.

These circuit splits reflect the extent to which the lower courts are struggling to deal with the statutory gaps exposed by this Court's decision in *Stern*. Only this Court can resolve those open questions.

I. This Court Should Resolve The Question Whether, And Under What Circumstances, Litigant Consent Can Confer On Non-Article III Judges Authority To Exercise The Judicial Power Of The United States

A. The Court of Appeals' Holding Conflicts With A Decision of the Sixth Circuit

In *Waldman* v. *Stone*, the Sixth Circuit considered and squarely rejected the argument that litigants can consent, by implication or otherwise, to a bankruptcy judge's entry of final judgment on a private right of action subject to Article III. 698 F.3d 910, 917–918 (2012), cert. denied, 2013 U.S. LEXIS 2333 (Mar. 18, 2013). "[T]he structural principle advanced by Article III," the Sixth Circuit reasoned, "is not [a litigant's] to waive." *Id.* at 918. The holding of the court of appeals below is directly to the contrary. According to the Ninth Circuit, "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests" and can therefore be waived. App. 28a & n.9. That direct conflict among the circuits reflects the ambiguity in this Court's own statements

on the issue. Only this Court can resolve that fundamental constitutional question.

The relevant facts in *Waldman* are identical to this case. Like EBIA, the defendant in *Waldman* was subject to a money judgment entered by a bankruptcy judge and affirmed by the district court. 698 F.3d at 916. Like EBIA, he argued in the court of appeals, in a supplemental brief following *Stern*, that the "judgment was beyond the bankruptcy court's power as limited by Article III of the Constitution." *Ibid.* And like EBIA, he was opposed by the plaintiff and the United States as amicus curiae, both of whom argued that the Article III objection was waived because the defendant had not raised the argument prior to appeal. *Id.* at 917.

Unlike the Ninth Circuit, however, the Sixth Circuit concluded that the defendant's purported waiver could not cure the constitutional defect in the bankruptcy judge's adjudication. The Sixth Circuit observed that Article III not only protects litigants' personal interest in an impartial adjudicator, but also " 'serves as an inseparable element of the constitutional system of checks and balances' " and thus embodies a "non-waivable structural principle." *Waldman*, 698 F.3d at 917 (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986)). The Sixth Circuit explicitly rejected the argument, advanced by the United States, that the structural component of Article III is implicated only where the encroachment or aggrandizement of one branch at the expense of another is at risk: "The issue here is not so much the aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one. * * * To the extent that Congress can shift the judicial Power to judges without [Article III] protections, the Judicial Branch

is weaker and less independent than it is supposed to be." *Id.* at 918. Because the bankruptcy judge's entry of final judgment "implicate[ed] * * * the structural principle advanced by Article III," the Sixth Circuit held that the constitutional defect could not be cured by the litigants' waiver. *Ibid.*

Notwithstanding the Sixth Circuit's decision in *Waldman*, the Ninth Circuit held that EBIA's failure to raise its Article III objection before the bankruptcy judge or the district court was dispositive. App. 26a–33a. Contrary to the Sixth Circuit, the Ninth Circuit concluded that entry of final judgment by bankruptcy judges on the consent of the parties raises no separation-of-powers concern "because bankruptcy judges are 'officer[s]' of the district court and are appointed by the Courts of Appeals." App. 27a n.9.

The question on which the Ninth and Sixth Circuits are divided was outcome determinative in EBIA's case. Had EBIA been sued for fraudulent conveyance in a bankruptcy court in Ohio, the final judgment entered against it by the bankruptcy judge would have been vacated. Because it was sued in bankruptcy court in Washington, the judgment was affirmed. Until this conflict is resolved by this Court, every judgment entered by a bankruptcy court on the basis of litigant consent will be in doubt, subject to possible vacatur on appeal if this Court ultimately agrees with the views of the Sixth Circuit.

B. Entry Of Final Judgment On A Private Right Of Action By A Non-Article III Bankruptcy Judge Violates The Separation Of Powers Regardless Of Litigant Consent

The Ninth Circuit's decision is, moreover, contrary to this Court's clear statements that the core structural features of Article III cannot be dispensed with by litigant consent. EBIA's purported consent thus could not have cured the constitutional defect in the bankruptcy court's adjudication identified by the Court in *Stern*.

This Court has repeatedly recognized that "Article III is 'an inseparable element of the constitutional system of checks and balances.'" *Stern*, 131 S. Ct. at 2608 (quoting *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). Article III protects the separation of powers by reserving in "one supreme Court" and "such inferior Courts" as Congress may establish—and in those courts alone—the "judicial Power of the United States." U.S. Const. art. III, § 1, cl. 1; see *Stern*, 131 S. Ct. at 2608.

The Court has made clear that Article III's protection of the separation of powers cannot be overcome by waiver or litigant consent. As the Court explained in *Schor*: "To the extent that this structural principle [of separation of powers] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." 478 U.S. at 850–851; see also *id.* at 867 (Brennan, J., dissenting) ("[C]onsent is irrelevant to Article III analysis."); *Peretz* v. *United States*, 501 U.S. 923, 950 (1991) (Marshall, J., dissenting) (citing *Schor* for the proposi-

tion that "parties may *not* waive Article III's structural guarantee"). Consistent with that principle, the Court has held that a litigant cannot consent to presence of a non-Article III judge on a panel of the court of appeals. *Nguyen* v. *United States*, 539 U.S. 69, 80 (2003) (explaining that "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals * * * such a stipulation would not have cured the plain defect in the composition of the panel"). The Court has likewise held that other structural constitutional objections cannot be overcome by litigant consent. See *Freytag* v. *Comm'n of Internal Revenue*, 501 U.S. 868, 879–880 (1991) (Appointments Clause objection). Thus, at least to the extent that the exercise of judicial power by a non-Article III bankruptcy judge threatens the separation of powers, notions of waiver and consent are irrelevant to the constitutional analysis.

Of course, "[p]rivate parties may, without offense to the Constitution, agree to settle their disputes *outside the federal adjudicatory system*." *Schor* v. *Commodity Futures Trading Comm'n*, 740 F.2d 1262, 1274 (D.C. Cir. 1984) (Ginsburg, R.B., J.) (emphasis added) (explaining that arbitration "does not implicate the separation of powers" for this reason), rev'd on other grounds, 478 U.S. 833 (1986); see *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting) (explaining that, unlike magistrates, "[a]rbitrators are not public officials" and "[t]heir decisions carry no official imprimatur"). Likewise, state court adjudication of claims that could have been asserted in federal court does not offend the Constitution, notwithstanding that state court judges are not appointed in accordance with Article III. Only

where the adjudicator is an organ of the federal government is the judicial power "of the United States" implicated, and the separation of powers potentially endangered.

The broad statutory authority of bankruptcy judges to enter final judgments poses a serious risk to the separation of powers. As this Court recognized in *Stern*, bankruptcy judges exercise "the essential attributes of judicial power" by entering " 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal." 131 S. Ct. at 2618–2619. A judgment of a bankruptcy court carries the full weight of a judgment of the United States. It may be registered and enforced in another judicial district, 28 U.S.C. 1963, and it is entitled to preclusive effect in subsequent litigation, including in state courts, see *Stern*, 131 S. Ct. at 2600.

That bankruptcy judges are appointed by Article III judges rather than the political branches does render bankruptcy judges mere "adjuncts" of the district courts, nor alleviate the danger to the separation of powers that results from their entering final judgments. *Stern*, 131 S. Ct. at 2619 ("[I]t does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings."). Congress cannot circumvent Article III simply by commanding life-tenured judges to appoint lesser officers to exercise the judicial power of the United States. To the contrary, as this Court "emphatic[ally]" declared in *Stern*, the exercise of judicial power by bankruptcy judges poses a real "threat to the separation of powers" because "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." *Id.* at 2620.

The court of appeals' decision dismissed as insignificant the separation-of-powers concerns presented by the bankruptcy courts' exercising "the most prototypical * * * judicial power: the entry of a final, binding judgment." See *Stern*, 131 S. Ct. at 2615. Citing *Schor*'s statement that Article III serves "primarily personal, rather than structural, interests," the court of appeals held that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are 'officer[s] of' the district court and are appointed by the Courts of Appeals." App. 27a & n.9. But that holding disregards *Stern*, which unequivocally established that bankruptcy judges are *not* mere adjuncts of the district courts, and that Congress' allocation of judicial power to bankruptcy courts *does* infringe separation-of-powers principles. See 131 S. Ct. at 2619–2620. The court of appeals' reliance on *Schor* was also misplaced because, there, the Court based its conclusion that adjudication of counterclaims by the Commodity Futures Trading Commission (CFTC) posed "no genuine threat to [separation of powers] principles" in part on the fact that orders of the CFTC were enforceable only by a district court, and the district court's review was more searching than normal appellate standards. 478 U.S. at 853, 857. By contrast, this Court made clear in *Stern* that bankruptcy courts' entry of enforceable, final judgments on private rights of action, subject only to appellate review, *does* pose "a threat to the separation of powers." *Stern*, 131 S. Ct at 2610–2611, 2620. Because allocation of the judicial power of the United States to bankruptcy courts implicates separation-of-power principles, private litigants can no more "authorize[] the [bankruptcy] judge to render final judgments in such proceedings" than can Congress. *Id.* at 2619.

Contrary to the understanding of the court of appeals, no decision of this Court has ever held that litigant consent is sufficient to validate what would otherwise be a separation-of-powers violation of Article III. The court of appeals cited *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), and *Roell* v. *Withrow*, 538 U.S. 580 (2003), as holding that litigant consent can authorize the entry of final judgment by (respectively) a bankruptcy judge or magistrate judge that would otherwise violate the Constitution. See App. 27a–28a & n.10. But neither *MacDonald* nor *Roell* holds that Article III separation-of-power principles could be overcome by litigant consent.[1] The court of appeals also cited this Court's discussion in *Stern* of Pierce Marshall's waiver of any objection to the bankruptcy court's adjudication of his own defamation claim against the bankruptcy estate. App. 33a (citing *Stern*, 131 S. Ct. at 2606, 2608). But that discussion in *Stern* concerned only Pierce's purported *statutory* right to adjudication of the defamation claim by the district court. See 28 U.S.C. 157(b)(5). Because Pierce's claim

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[1] *MacDonald* does not even mention Article III and, as the plurality opinion in *Marathon* recognized, the practice of bankruptcy referees exercising plenary authority had "never been explicitly endorsed by this Court." 458 U.S. at 79 n.31. In *Roell*, the Court made clear that "[t]he *only question*" at issue was the statutory one: whether consent implied through conduct "can count as conferring 'civil jurisdiction' under [28 U.S.C.] § 636(c)(1)." *Roell*, 538 U.S. at 586–587 (emphasis added). Neither decision constitutes controlling precedent on the Article III questions presented by this petition. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

was asserted against the bankruptcy estate, there was no Article III right to adjudication by a district court. See *Marathon*, 458 U.S. at 71 (plurality opinion) ("restructuring of debtor-creditor relations * * * is at the core of the federal bankruptcy power"). Thus, the court of appeals was mistaken to think that this Court had endorsed litigant consent as sufficient to overcome Article III structural concerns.

Because the exercise of judicial power by non-Article III bankruptcy judges threatens the Constitution's separation of powers, EBIA's purported implied consent could not confer on the bankruptcy court the authority to enter final judgment.

C. Consent Is Only Relevant To An Article III Structural Analysis To The Extent Congress Made Consent A Feature Of The Statutory Scheme, Not Where It Is Inferred Post-Hoc From A Litigant's Failure To Object

To the extent consent is relevant to the Article III structural analysis, it is as part of the Court's review of the statutory scheme Congress adopted, not as part of a post-hoc analysis in an individual case. The Ninth Circuit's post-hoc approach to consent was plainly insufficient to eliminate separation-of-powers concerns. Nothing in the Bankruptcy Code ensures voluntary litigant consent to a bankruptcy court's adjudication of core claims. For this reason, and in light of binding circuit precedent upholding the statute, nothing would have advised EBIA of its right to insist on an Article III court. In *Roell*, Justice Thomas's dissenting opinion warned of the "serious constitutional concerns" raised by relying on implied consent to authorize adjudication by a magistrate judge. 538 U.S. at 592. Those constitu-

tional concerns are fully realized in the present case, where the court of appeals extended *Roell* to the point that "consent" no longer offers any protection for Article III values. Unlike the Federal Magistrate Act of 1979 considered in *Roell*, the Bankruptcy Code does not ensure that litigants in core proceedings are advised of their Article III rights. In the present context, the court of appeals' invocation of "implied consent" was merely a post-hoc justification for an unconstitutional statutory scheme. The result is that a litigant who made every available objection to litigating in bankruptcy court under then-existing precedent was held to have waived an Article III right that no bankruptcy or district court could have recognized until the court of appeals overturned its own precedent.

1. To the extent consent can form a part of the separation-of-powers analysis, it must be central to the statutory scheme

Even where consent can be considered as part of the Article III separation-of-powers analysis, it is not alone dispositive, but must be weighed as one of several factors in assessing the constitutionality of the statutory scheme under review. See *Schor*, 478 U.S. at 855; *Stern*, 131 S. Ct. at 2625 (Breyer, J., dissenting) (noting five factors considered in *Schor*). For litigant consent to lessen Article III separation-of-powers concerns about a statutory grant of judicial power to non-Article III courts, the requirement of genuine and voluntary consent must be a central, limiting feature of the statute. If litigants are unaware of their right to insist on adjudication by an Article III judge, then the notion of "consent" does not constrain a statute's potential to erode Article III courts' constitutional role. In *Schor*, the Court considered consent as a factor in its separa-

tion-of-powers analysis because consent was an essential feature of every matter adjudicated by the CFTC: "the decision to invoke [that] forum [was] left entirely to the parties." 478 U.S. at 855.

In other instances where Congress has assigned adjudicatory power over private rights to non-Article III judges, it has specifically incorporated litigant consent into the statutory scheme. The Bankruptcy Code, for example, authorizes bankruptcy judges to finally adjudicate *non*-core proceedings only if "the district court, with the consent of all of the parties to the proceeding," refers the matter to the bankruptcy judge. 28 U.S.C. 157(c)(2); see Fed. R. Bankr. P. 7008, 7012 (requiring parties' pleadings to state whether "the party does or does not consent to entry of final orders or judgment by the bankruptcy judge"). Likewise, the Federal Magistrates Act permits civil cases to be assigned to magistrate judges for final adjudication only "[u]pon the consent of the parties," and under procedures that "advise the parties that they are free to withhold consent" and are otherwise designed "to protect the voluntariness of the parties' consent." 28 U.S.C. 636(c)(1), (2); see also *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir.) (en banc) (Kennedy, J.) (noting the Federal Magistrate Act's "statutory safeguard[]" through "the requirement of litigant consent"), cert. denied, 469 U.S 824 (1984).

The adjudication of core claims by bankruptcy judges under the Bankruptcy Code does not depend on litigant consent at all. As the Court recognized in *Stern*, Congress has in such actions assigned bankruptcy judges "the power to adjudicate, render final judgment, and issue binding orders * * * without consent of

the litigants." 131 S. Ct. at 2615 (internal quotation marks omitted). Because Congress did not incorporate consent into the statutory scheme for core claims, there was nothing in the statute to ensure that EBIA genuinely and voluntarily consented to adjudication of the claims against it by a non-Article III judge, and nothing to limit the encroachment on the authority of Article III courts.

The court of appeals' finding of consent in the case at bar did not implement a limiting statutory feature that cabins Congress's reallocation of Article III authority, but was rather a post-hoc rationalization of an unconstitutional statute. The courts should not save Congress from its own violations of Article III. Where the statutory scheme adopted by Congress breaches the separation of powers, the fortuity of litigant consent not contemplated by the statute is irrelevant. See *Schor*, 478 U.S. at 850–851; *Pacemaker*, 725 F.2d at 544 ("Statutes * * * which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, despite waiver by affected private parties."). If this Court is to consider litigant consent at all in assessing the separation-of-powers implications of a statute, it should insist that Congress include consent in the statute it enacts.

2. The court of appeals' decision illustrates the danger of allowing post-hoc findings of implied consent to form part of the separation-of-powers analysis

In *Stern*, this Court held unequivocally, even "emphatically," that Congress's assignment of private rights to final adjudication by bankruptcy judges violated the "separation of powers." 131 S. Ct. at 2620.

But the court of appeals treated the issue of consent as though all that was at stake were "personal, rather than structural, interests." App. 27a (quoting *Schor*, 478 U.S. at 848); see also App. 27a n.9 ("[T]he allocation of authority between bankruptcy courts and district courts does not implicate structural interests."). In the court of appeals' view, as long as EBIA could be said, after the fact, to have "waived its right to an Article III hearing" through its litigation conduct, Article III was satisfied. App. 26a. The tenuous facts from which the court of appeals inferred EBIA's consent demonstrate how little protection that approach affords Article III values. The court of appeals' holding goes far beyond what this Court has previously recognized as sufficient to evidence voluntary consent to adjudication by a non-Article III judge.

This Court has held that consent to adjudication by a non-Article III tribunal must at the very least be given by a litigant who "was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before a non-Article III judge. *Roell*, 538 U.S. at 590; *id.* at 587 n.5 (holding that "notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent"). Other courts of appeals have likewise recognized that unambiguous voluntary consent is essential to preserving Article III from encroachment. See, *e.g.*, *Phillips* v. *Beierwaltes*, 466 F.3d 1217, 1221 (10th Cir. 2006) ("Because there was no notification to the Beierwaltes or their counsel of the need to consent or the right to refuse consent, *Roell* does not permit us to infer consent * * * ."); *Donaldson* v. *Ducote*, 373 F.3d 622, 624 n.1 (5th Cir. 2004) (holding that *Roell* "did not alter our rule that the party's consent must be clear and unam-

biguous"); *Sheridan* v. *Michels (In re Sheridan)*, 362 F.3d 96, 101 (1st Cir. 2004) (no consent where litigant's "conduct did not unambiguously connote consent, either to the bankruptcy court's characterization of the proceeding as core or to its final adjudication of the proceeding as non-core"); *Pacemaker*, 725 F.2d at 546 (voluntary consent "essential to the constitutionality" of the Federal Magistrates Act).

Here, the court of appeals found that EBIA had "impliedly consented" to final adjudication by a bankruptcy judge even though the statute in question assigned adjudication to the bankruptcy court, without regard to litigant consent, and binding circuit precedent had upheld that statutory scheme against constitutional challenge. In those circumstances, a finding of "consent" cannot serve the function this Court has attributed to consent as a factor that reduces Article III concerns. EBIA was never made aware of the "need to consent" to proceedings before the bankruptcy court or of its "right to refuse it." As noted, under Section 157(b)(2)(H), fraudulent conveyance actions were deemed "core" proceedings, and bankruptcy courts were authorized to "hear and determine" such proceedings, including issuing final judgments, without regard to the consent of the parties. 28 U.S.C. 157(b); cf. 28 U.S.C. 157(c)(2) (requiring litigant consent for final adjudication of non-core proceedings by a bankruptcy judge). Moreover, controlling case law in the Ninth Circuit at that time upheld as valid under Article III Section 157(b)'s assignment of fraudulent conveyance claims against non-creditors to final adjudication by a bankruptcy judge *even where the defendant objected.* See *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), overruled by, App 15a. An objection by EBIA

that it did not consent to adjudication before a bankruptcy judge would have been futile. See *Robinson* v. *Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (holding that "[n]o exception is required when it would not have produced any results in the trial court because a solid wall of Circuit authority then foreclosed the point").

Contrary to the understanding of the court of appeals, the fact that intervening judicial decisions might have provided a basis to challenge the statute and precedent does not provide the same safeguard of Article III values as a requirement that parties be notified before the fact of their right to insist on an Article III tribunal. The court of appeals suggested that *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1988), should have foreshadowed to EBIA and its counsel the eventual demise of *Mankin* and unconstitutionality of Section 157(b)(2)(H). App 32a. *Granfinanciera* did confirm that a fraudulent conveyance defendant could insist on its right to trial by jury, and EBIA did assert that right, repeatedly. 492 U.S. at 36; App. 77a–80a, 82a. *Granfinanciera* did not, however, establish that a litigant had a right to insist on an Article III judge to adjudicate dispositive pre-trial motions. And, indeed, the Ninth Circuit's own decision in *Stern* did not even reference *Mankin*, much less overrule it. See generally *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011). Thus, there was no notice to EBIA that it had a right to insist that the Trustee's pre-trial motion for summary judgment be decided by the district court.[2]

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[2] Notably, the district court also appears to have distinguished between the Seventh Amendment right to a jury trial be-

Because EBIA was never made aware of the need for consent or its right to refuse it, the implied consent found by the Ninth Circuit could not have been voluntary. The Ninth Circuit's holding in this case goes far beyond the holding of this Court in *Roell* and the holdings of other courts of appeals.

II. This Court Should Resolve The Conflict Among Lower Courts On Whether Bankruptcy Judges Are Statutorily Authorized To Submit Proposed Findings Of Fact And Conclusions Of Law In "Core" Proceedings

After *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), bankruptcy judges can no longer finally adjudicate some proceedings statutorily designated as "core" under Section 157(b). Section 157(c), which allows bankruptcy judges to "submit proposed findings of fact and conclusions of law to the district court," only applies in proceedings that are "not * * * core." 28 U.S.C. 157(c)(1). The court of appeals recognized that *Stern*'s holding left a "gap" in the statute. App. 23a. Rather than wait for Congress to address this statutory gap, the Ninth Circuit rewrote Section 157(b) to authorize bankruptcy judges to propose findings of fact and conclusions of law in core proceedings.[3] The text and

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fore the district court and adjudication of dispositive pre-trial motions, which the court left to the bankruptcy judge. App. 62a–63a.

[3] In light of the court of appeals' finding that EBIA consented to final adjudication by the bankruptcy court, its discussion of the bankruptcy court's authority to propose findings of fact and conclusions of law was technically dictum. But it is nonetheless binding in the Ninth Circuit. See *Miranda B.* v. *Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) ("[W]here a panel confronts an issue

structure of Section 157 make clear that Congress did not provide bankruptcy courts that authority in core proceedings, and it is up to Congress, not the courts, to remedy the statutory gap.

A. The Ninth Circuit's Decision Conflicts With A Decision Of The Seventh Circuit

In *In re Ortiz*, 665 F.3d 906 (2011), the Seventh Circuit concluded that bankruptcy judges lack statutory authority to issue a report and recommendation in a core proceeding. *Id.* at 915. The question arose in the context of a direct appeal from a bankruptcy judge's grant of summary judgment on a state law claim in a core proceeding. *Id.* at 908–909. To determine its own jurisdiction, the Seventh Circuit was required to decide how the bankruptcy judge's purportedly final judgment could be characterized after *Stern*. See 28 U.S.C. 158(a), (d)(2)(A). Based on a textual reading of the statute, the Seventh Circuit rejected the possibility that the bankruptcy judge's decision could be deemed proposed findings of fact and conclusions of law. *Ortiz*, 665 F.3d at 915. It observed that bankruptcy judges are authorized to issue proposed findings and conclusions under 28 U.S.C. 157(c)(1), but that section only applies to proceedings that are "not a core proceeding"

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germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." (internal quotation marks omitted)). If this Court were to agree with petitioner's first argument that the bankruptcy court's judgment violated Article III and must be vacated, then the Court should address the court of appeals' erroneous holding concerning the scope of the bankruptcy court's authority, which would otherwise be binding on remand.

but are "otherwise related to a case under title 11." *Ibid.* Because the proceeding in *Ortiz* was "core," *id.* at 911–912, the Seventh Circuit concluded that the bankruptcy court lacked statutory authority to issue proposed findings of fact and conclusions of law, *id.* at 915.

The Ninth Circuit's decision below is directly contrary to that of the Seventh Circuit in *Ortiz*. Instead of adhering to the text of the statute, as the Seventh Circuit did, the Ninth Circuit reasoned that "the power to 'hear and determine' a proceeding" could be read to encompass the "more modest"—but distinct—"power to submit findings of fact and recommendations of law to the district courts." App. 24a.

B. The Ninth Circuit's Holding Is Contrary To The Text And Structure Of The Statute

Congress clearly distinguished between the authority it granted bankruptcy courts in core proceedings and in non-core proceedings. Contrary to the ruling of the Ninth Circuit, the latter is not simply a subset of the former. Rather, the text and structure of Section 157 make clear that core and non-core proceedings are subject to two entirely distinct adjudicatory procedures. The "gap in the [statutory] framework," App. 23a, revealed when this Court held in *Stern* that bankruptcy courts cannot finally adjudicate certain statutory core cases, is a gap that only Congress can fill.

1. Statutory construction "begin[s] with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The court of appeals' construction of the phrase "hear

and determine" as encompassing proposed findings of fact and conclusions of law cannot be squared with text of the statute. A "determination" is a "final decision." Black's Law Dictionary 514 (9th ed. 2009). The word "determine" thus connotes finality—not the issuance non-final recommendations.

That reading is confirmed by the fact that Congress only provided for *appellate* review of matters that the bankruptcy court is to "hear and determine." In Section 157(b)(1) Congress specified that in core proceedings that a bankruptcy court may "hear and determine," the bankruptcy court "may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. 157(b)(1). Section 158(a), in turn, is entitled "appeals" and provides district courts with "jurisdiction to hear appeals" from bankruptcy court final judgments, orders, and decrees and from certain classes of interlocutory orders. See 28 U.S.C. 158(a). Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment in a core proceeding that has been referred to the bankruptcy court. Section 157(c)(2), which authorizes bankruptcy courts to "hear and determine" certain non-core proceedings on the consent of the parties, likewise specifies that the bankruptcy court may "enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title." 28 U.S.C. 157(c)(2).

By contrast, Section 157(c)(1), which is limited to non-core proceedings, see *Stern*, 131 S. Ct. 2605, authorizes bankruptcy courts to "submit proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1). Section 157(c)(1) further specifies that "*any final order or judgment shall be entered by the district courts*" after reviewing "de novo" those

parts of the bankruptcy court's proposal to which the parties have objected. *Ibid.* (emphasis added). Section 157(b) grants no similar authority to district courts to review de novo or enter final judgment in core proceedings that have been referred to the bankruptcy court.

This structural dichotomy between core and non-core proceedings, including in particular the provision for district court de novo review and entry of judgment only in non-core proceedings, confirms that Congress only granted bankruptcy courts authority to conclusively adjudicate core proceedings, not to issue non-final proposed findings of fact and conclusions of law.

2. Other indications confirm that Congress intended the phrase "hear and determine" to require a final decision, rather than mere submission of proposed findings of fact and conclusions of law. The sponsors of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act") explained that the bill empowered bankruptcy judges to "enter final judgments in the 95 percent of cases that do not require involvement by an article III judge." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). Indeed, the bill's sponsors listed as a benefit of the Act that it would "provide[] a *single, prompt forum* for almost all bankruptcy litigation," and that "the bankruptcy judges would make recommendations to the district court, rather than enter final judgments, in [only] about 5 percent of bankruptcy matters." *Ibid.* (emphasis added). The efficiency of *avoiding* proposed findings and conclusions in core proceedings was thus an important consideration in Congress' choice of language to describe the powers of bankruptcy courts in the respective proceedings.

Moreover, Congress has employed the "hear and determine" language in other contexts as well to require a final decision and preclude the possibility of a non-final proposal of findings and conclusions. The use of the phrase "hear and determine" in the Federal Magistrates Act, upon which Section 157 was based, 130 Cong. Rec. at 6046–6047, was intended to avoid unnecessary and duplicative reports and recommendations and to "make[] it clear that Congress intends that the magistrate shall have the power to make a determination of any pretrial matter * * * and that this determination * * * shall be 'final,'" H.R. Rep. No. 94-1609, at 10 (1976). Congress believed it "duplicative to require a 'report and recommendation' from the magistrate to the judge as a prelude to a separate order by the judge." *Ibid.* Similarly, this Court has elsewhere held that Congress uses "hear and determine" when it wants to "get * * * dispute[s] settled" and convey "the idea of deciding a controversy." *N.L.R.B.* v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573, 579 (1961) ("hear and determine" means NLRB must issue decision and settle dispute).

C. It Is For Congress, Not The Courts, To Determine How To Address The Statutory "Gap" Revealed By *Stern*

As this Court has explained on several occasions, filling statutory gaps created by this Court's constitutional rulings is the responsibility of Congress, not the federal courts. Courts are "not free to rewrite the statutory scheme in order to approximate what [they] think Congress might have wanted had it known that [a particular provision] was beyond its authority." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996).

This Court has previously taken exactly this approach with respect to Article III defects arising from the allocation of authority to bankruptcy courts. In *Northern Pipeline Construction Company* v. *Marathon Pipe Line Company*, after holding that bankruptcy judges cannot decide state law contract claims consistent with Article III, the Court did not attempt to reform the statute based on what it believed Congress might have wanted. 458 U.S. 50, 87 n.40 (1982) (plurality opinion). Instead, the Court left it to "Congress to determine the proper manner of restructuring the Bankruptcy Act." *Ibid.*

Other lower courts have also attempted to remedy the statutory gap created by *Stern*, but these efforts, like that of the court of appeals, underscore that the responsibility for amending the statute rests with Congress alone. Several lower courts, for example, have reclassified fraudulent conveyance actions as non-core and on that basis have purported to permit bankruptcy judges to propose findings and conclusions under Section 157(c)(1). See, *e.g.*, *Field* v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421, 427–428 (D. Haw. 2011); *Paloian* v. *Am. Express Co. (In re Canopy Financial, Inc.)*, 464 B.R. 770, 774–775 (N.D. Ill. 2011). Of course, this directly contradicts the text of the statute, as well as this Court's directive in *Stern* that the courts must honor Congress's designation of proceedings as core or non-core. *Stern*, 131 S. Ct. at 2604–2605.

Several judicial districts have gone even farther, effectively attempting to amend the statute through the adoption of standing orders that purport to grant bankruptcy courts the authority to propose findings of fact and conclusions of law in core proceedings where the bankruptcy courts cannot, consistent with Article

III, issue final judgments. See, *e.g.*, *In re Standing Order of Reference Re: Title 11*, No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012); *In re Standing Order of Reference Re: Title 11* (D. Del. Feb. 29, 2012); *In re Bankruptcy Proceedings*, Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). That numerous courts have found the need to adopt such quasi-legislation in the wake of *Stern* demonstrates the broad significance of this issue, which cries out for this Court's review.

As discussed above, it was a goal of the 1984 Act that all statutory core matters be determined in *one* forum, without the need for duplicative report and recommendation proceedings. Now that the core/non-core distinction currently delineated by statute has been unsettled by *Stern*, Congress may choose any number of reasonable policy alternatives. It may ultimately choose to grant bankruptcy judges authority to issue reports and recommendations in core proceedings, and grant district courts authority to enter judgment upon de novo review of such reports and recommendations. But Congress may also choose an entirely different approach, with a changed allocation of power and responsibilities between the district courts and bankruptcy judges. It is impossible to predict with any certainty how Congress might choose to respond to *Stern*. Without doubt, however, that responsibility lies with Congress and not the courts. *Marathon*, 458 U.S. at 87 n.40.

III. This Court's Review Is Necessary To Resolve Tremendous Uncertainty In The Lower Courts Following *Stern*

As demonstrated by the decision below, and by the circuit splits of which it is part, this Court's decision in *Stern*, has given rise to tremendous uncertainty among

the lower courts. As one bankruptcy judge observed, the "huge uncertainty" that *Stern* raises concerning whether litigant consent is sufficient to permit bankruptcy courts to enter final judgment "presages litigation over that issue with the potential to tie up this case, and countless others, in knots." *In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011); cf. *Tech. Automation Servs. Corp.* v. *Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–407 (5th Cir. 2012) (raising sua sponte whether magistrates may enter final judgment with litigant consent after *Stern*). Writing about this very case, one scholar has observed that the Ninth Circuit's decision created "a split among the circuits and the need for the Supreme Court to decide an issue that affects litigants across the country every day." Erwin Chemerinsky, *Circuit Split Over Parties Expanding A Bankruptcy Court's Power*, Daily J. (Feb. 12, 2013); see also Ralph Brubaker, *The Constitutionality of Litigant Consent*, 32 No. 12 Bankr. L. Letter (Dec. 2012) 1 ("Given the importance of § 157(c)(2), in particular, to the routine functioning of the bankruptcy court system, the Supreme Court may soon need to clarify the constitutional validity of litigant consent to non-Article III bankruptcy adjudications."); Erwin Chemerinsky, *Enormous Confusion*, Nat'l L.J. (Aug. 29, 2011).

Stern has also resulted in substantial confusion regarding the authority of bankruptcy judges to propose findings of fact and conclusions of law in core proceedings. District courts have complained of being placed in "something of a procedural morass" following *Stern*, *In re Coudert Bros. LLP*, No. 11-2785, 2011 WL 5593147, at *13 (S.D.N.Y. Sept. 23, 2011), and have noted the "large number of motions to withdraw the reference

that have been brought * * * in the wake of *Stern*, many of which advance statutory 'gap' arguments," *Weisfelner* v. *Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712, 724 (S.D.N.Y. 2012). Attempts by the lower courts to remedy the "gap" by rewriting the statute only heighten the need for this Court's review. And the number of amici who participated in the court of appeals plainly demonstrates the importance of this issue to the bankruptcy bar. See App. 3a–4a.

The questions presented by this petition implicate the integrity of the Constitution's system of separated powers and directly affect countless federal proceedings that occur before non-Article III judges every day. These issues have perplexed the bankruptcy and district courts, and now have divided the courts of appeals. Prompt resolution of these questions by this Court is therefore critical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2013

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of

BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY,
Appellant,

v.

PETER H. ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Appellee.

No. 11-35162

D.C. No. 2:10-cv-00929-MJP

OPINION

Appeal from the United States District Court
for the Western District of Washington

Marsha J. Pechman, Chief District Judge, Presiding

Argued and Submitted
October 13, 2011—Seattle, Washington

Filed December 4, 2012

Before: Alex Kozinski, Chief Judge, Richard A. Paez, Circuit Judge, and Raner C. Collins,* District Judge.

Opinion by Judge Paez

SUMMARY**

Bankruptcy

Affirming the district court's affirmance of the bankruptcy court's summary judgment, the panel held that a non-Article III bankruptcy judge lacks constitutional authority to enter a final judgment in a fraudulent conveyance action against a nonclaimant to the bankruptcy estate, but that the nonclaimant here waived its right to an Article III hearing.

The panel held that following *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the public rights exception to the rule of Article III adjudication does not encompass federal-law fraudulent conveyance claims, even though Congress designated such claims as core bankruptcy proceedings. The panel stated that in light of *Stern*, *In re Mankin*, 823 F.3d 1296 (9th Cir. 1987), was overruled. The panel held that 11 U.S.C. § 157(b)(1) provides bankruptcy courts the power to hear fraudulent conveyance cases and to submit reports and recommendations to the district courts.

The panel also held that the right to a hearing in an Article III court is waivable, and that here the nonclaimant consented to the bankruptcy judge's adjudica-

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* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

tion of the fraudulent conveyance claim by failing to object until the case reached the court of appeals.

The panel held that the bankruptcy trustee satisfied all elements of a constructively fraudulent transfer of the debtor's property under 11 U.S.C. § 548 and under Washington State law. In addition, the nonclaimant was a successor corporation of the debtor and therefore liable for its debts.

COUNSEL

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Paul D. Moore; Duane Morris LLP, Boston, Massachusetts, for Amici Curiae New CH YMC Acquisition

LLC, Yellowstone Mountain Club, LLC, and Yellowstone Development, LLC.

Lynne F. Riley; Riley Law Group LLC, Boston, Massachusetts; and Jessica D. Gabel; Georgia State University College of Law, Atlanta, Georgia, for Amicus Curiae National Association of Bankruptcy Trustees.

Nathaniel Garrett; Jones Day, San Francisco, California, for Amicus Curiae Jones Day.

Sarang Vijay Damle and Robert Loeb; U.S. Department of Justice Civil Division, Washington, D.C., for Amicus Curiae United States of America.

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OPINION

PAEZ, Circuit Judge:

This quotidian bankruptcy case presents a novel question: can a non-Article III bankruptcy judge enter a final judgment in a fraudulent conveyance action

against a nonclaimant to the bankruptcy estate? Federal law empowers bankruptcy judges to do so, but we hold that the Constitution forbids it.

The Executive Benefits Insurance Agency suffered an adverse final judgment in a fraudulent conveyance at the hands of a bankruptcy judge. But our decision today is no reprieve, because we also hold that the company consented to the adjudication of the fraudulent conveyance claim by a bankruptcy judge by failing to object until the case reached this court. Thus, unencumbered by constitutional doubts, we review the entry of summary judgment de novo, and affirm.

I

Nicholas Paleveda and his wife, Marjorie Ewing, operated a welter of companies, including Aegis Retirement Income Services, Inc. ("ARIS") and the Bellingham Insurance Agency, Inc. ("BIA"). ARTS designed and administered defined-benefit pension plans, and BIA sold insurance and annuity products that funded those plans.

BIA and ARIS were closely related: Paleveda owned 100% of ARIS and served as the CEO and sole director of BIA until February 14, 2006, when Ewing took over. Ewing owned 80% of BIA and served as ARIS's general manager. ARIS and BIA shared an office and a phone number. Because ARIS lacked sufficient assets to operate independently, it routed all of its income and expenses through BIA, kept joint accounting records with BIA, and declared its income on consolidated tax returns with BIA.

By early 2006, BIA was insolvent. And though the company ceased operations on January 31, 2006, it

did not stop acting entirely. Two weeks after closing its doors, the company irrevocably assigned the insurance commissions from one of its largest clients, the American National Insurance Company, to Peter Pearce, a longtime BIA and ARIS employee who had often acted as a conduit for insurance commissions between BIA and its clients.

The day after BIA stopped operating, Paleveda used BIA funds to incorporate the Executive Benefits Insurance Agency, Inc. ("EBIA"). In 2006, $373,291.28 of commission income earned between January 1 and June 1 was deposited into an account held jointly by ARIS and EBIA. Pearce deposited $123,133.58 and EBIA deposited the remainder. At the end of the year, all of the deposits were credited to EBIA via an "intercompany transfer."[1]

In the meantime, BIA had filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. The Trustee, Peter Arkison—the Appellee in this case—filed a complaint against EBIA and ARIS in the same court to recover the commissions deposited into the EBIA/ARIS account, which the Trustee alleged to be property of the estate. The complaint alleged eighteen causes of action, including federal- and state-law preferential and fraudulent transfer claims and a claim that EBIA was a successor corporation of BIA and therefore liable for its debts.

The bankruptcy court granted summary judgment in favor of the Trustee, concluding that the depos-

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[1] As the district court did, we draw these facts from the uncontroverted accounting evidence produced by the Trustee.

its into the EBIA/ARIS account were fraudulent conveyances of BIA assets and that EBIA was a "mere successor" of BIA. The bankruptcy court entered a final judgment for $373,291.28.[2]

EBIA appealed to federal district court. The district court affirmed, holding that the commissions paid into the ARIS/EBIA account were fraudulent transfers under both the Bankruptcy Code, 11 U.S.C. § 548, and Washington's Uniform Fraudulent Transfer Act, Wash. Rev. Code § 19.40.041. The district court also affirmed the bankruptcy court's judgment that EBIA was liable for BIA' s debts as a corporate successor.

EBIA appealed. In a motion to dismiss submitted prior to oral argument, EBIA objected for the first time to the bankruptcy judge's entry of final judgment on the Trustee's fraudulent conveyance claims. Styled

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[2] In total, EBIA was credited with $373,291.28 in commission income for the January 1, 2006 to June 1, 2006 period, an amount that formed the basis of the bankruptcy court's judgment. Of this total, $123,133.58 was deposited by Pearce, and the remaining $250,836.98 was deposited by EBIA itself.

In his declaration, the Trustee's accounting expert, Michael Quackenbush, appears to have improperly summed these figures. He avers, "There are five deposits buy [sic] Pearce totaling $122,454.30. There are 14 additional deposits into the ARIS account by EBIA for commissions it earned totaling $277,885.82. Thus the total commissions deposited into the ARIS account for commissions earned from BIA related business was $373,291.28." In fact, the sum of $122,454.30 and $277,885.82 is $400,340.12, according to Microsoft's venerable Windows Calculator. Some expert. The accountant also summed the deposits within each category incorrectly: the Pearce deposits actually total $123,133.58, and the EBIA deposits total $250,157.70. Because the corrected figures sum to $373,291.28, however, the expert's errors did not undermine the accuracy of the bankruptcy court's judgment.

as a motion to vacate the judgment for lack of subject-matter jurisdiction, and relying on *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the motion argued that the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims.[3] It is to this vexing constitutional issue that we first turn.

II

A

Bankruptcy judges are appointed for terms of 14 years, 28 U.S.C. § 152(a)(1), and their salaries are subject to Congressional diminution. *Id.* § 153(a). Hence, bankruptcy judges cannot exercise "[t]he judicial Power of the United States," which is vested by the Constitution in courts whose judges enjoy life tenure and salary protection. U.S. Const. art. III, § 1.

Nonetheless, bankruptcy judges enjoy substantial statutory authority. Although the district courts have exclusive jurisdiction over "all cases under title 11," *id.* § 1334(a), they may refer all of the cases within that broad jurisdiction to bankruptcy judges, *id.* § 157(a). What the bankruptcy court may do with a given referred proceeding depends on whether the proceeding is denominated a "core" or a "non-core" proceeding. In all "core proceedings arising under title 11,

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[3] Following oral argument in this appeal, we invited briefs from amicus curiae on the questions: 1) whether bankruptcy courts may enter a final, binding judgment on an action to avoid a fraudulent conveyance, and 2) whether, if they cannot enter such final judgments, bankruptcy courts may hear the proceeding and submit a report and recommendation to a federal district court. *See Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 661 F.3d 476 (9th Cir. 2011). We appreciate the many thoughtful briefs that were submitted in response to our invitation.

or arising in a case under title 11," a bankruptcy judge has the power to "hear and determine the controversy" and enter final orders, subject only to appellate review. *Id.* § 157(b)(1). In a non-core proceeding "that is otherwise related to a case under title 11," however, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." *Id.* § 157(c)(1). The entry of final judgment in non-core proceedings is the sole province of Article III judges.

Section 157(b)(2) enumerates sixteen nonexclusive examples of "core proceedings." Among these are "proceedings to determine, avoid, or recover fraudulent conveyances." *Id.* § 157(b)(2)(H). The bankruptcy judge hearing the Trustee's claim was thus empowered by statute to enter a final judgment. Indeed, until quite recently, the exercise of that statutory power was routine and uncontroversial. *See, e.g.*, *Jones v. Schlosberg*, No. 04-00571, 2005 WL 6764810, at *5–6 (C.D. Cal. 2005) (affirming a bankruptcy court's entry of judgment in a fraudulent conveyance action); *see also Duck v. Munn (In re Mankin)*, 823 F.2d 1296, 1300–01 (9th Cir. 1987) (holding that both state- and federal-law fraudulent conveyance actions are core proceedings). But following the Supreme Court's decision in *Stern v. Marshall*, the view that such judgments are consistent with the Constitution is no longer tenable.

B

To explain why this is so, we must begin somewhat earlier, with the Supreme Court's epochal decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Bankruptcy Reform Act of 1978 invented the modern bankruptcy judge, subject to the same conditions as today: a 14-

year term and a mutable salary. *Id.* at 53. *Northern Pipeline* was the Supreme Court's first effort to demarcate the constitutional limits of these judges' authority.

Northern Pipeline filed a Chapter 11 petition for reorganization in a bankruptcy court. *Id.* at 56. It then filed a suit against Marathon Pipe Line for a prepetition breach of contract and warranty. *Id.* Marathon sought to dismiss the suit on the grounds that the claim at issue could only be decided by an Article III judge. *Id.*

A plurality of the Court agreed that the assignment of Northern Pipeline's state-law claims for resolution by a bankruptcy judge violated Art. III of the Constitution. *Id.* at 87 (Brennan, J., plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). The plurality admitted to only three exceptions to the rule of Article III adjudication: territorial courts, *id.* at 64, military tribunals, *id.* at 66, and cases involving "public" as opposed to "private" rights, *id.* at 67.[4] Outside of the narrowly drawn exceptions for territorial and military courts, the distinction between public and private rights was the crucial determinant of whether a dispute belonged in an Article III court: "Our precedents clear-

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[4] A majority of the *Northern Pipeline* Court also acknowledged that it is constitutionally permissible for an Article III court to assign factfinding responsibility to an adjunct, provided that the Article III court retains "the essential attributes of the judicial power." 458 U.S. at 77 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (internal quotation marks omitted)). Nonetheless, "the bankruptcy court is not an 'adjunct' of either the district court or the court of appeals." *Id.* at 91 (Rehnquist, J., concurring in the judgment); *see also id.* at 81–86 (plurality opinion). *Stern* reaffirmed that bankruptcy courts are not adjuncts. *See* 131 S. Ct. at 2611 ("Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts . . . .").

ly establish," the Court explained, "that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power." *Id.* at 70 (internal citations and footnote omitted).

While a majority of the Court could not agree on the scope of the public rights exception, a majority did agree that the public rights exception could not justify the adjudication of Northern Pipeline's claims by a non-Article III officer. *See id.* at 69 (plurality opinion); *id.* at 91 ("To whatever extent different powers granted under [the Bankruptcy Reform] Act might be sustained under the 'public rights' doctrine . . . I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.") (Rehnquist, J., concurring).

Despite consigning the breach of contract and breach of warranty claims at issue to the category of private rights, the *Northern Pipeline* plurality hinted that some quantum of bankruptcy proceedings might fall within the public rights exception:

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.

Id. at 71.

Following the *Northern Pipeline* decision, Congress amended the statutes governing bankruptcy jurisdiction and bankruptcy judges. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333 (the "1984 Act"). The legislation enacted, among other reforms, the division of claims in bankruptcy cases into core and non-core proceedings. This distinction was clearly inspired by the *Northern Pipeline* plurality's dictum that certain proceedings "at the core of the federal bankruptcy power . . . may well be a 'public right.'" 458 U.S. at 71; *see also In re Mankin*, 823 F.2d at 1305.

The cases following *Northern Pipeline* created substantial new ambiguity about the content and import of the public rights exception. In *Thomas*, the Court addressed a law that required pesticide manufacturers to submit research data to the Environmental Protection Agency on a new product's "health, safety, and environmental effects." 473 U.S. at 571. The law allowed subsequent registrants of similar products to rely on the proprietary data, but required them to compensate the first manufacturer for the data and to submit to binding arbitration of any disagreement over the fee amount. *Id.* at 573–74. The *Northern Pipeline* plurality had defined public rights as "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." 458 U.S. at 67–68 (plurality opinion) (internal quotation marks omitted). The *Thomas* Court rejected that definition, opting for a more fluid position: "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be con-

clusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68). Under this newly pragmatic approach, the Court was convinced that "the right created by [the statute] is not a purely 'private' right." *Id.* Rather, it bore "many of the characteristics of a 'public' right": it "serve[d] a public purpose as an integral part of a program safeguarding the public health" and "represent[ed] a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product." *Id.* at 589–90.

Similarly, in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833,851 (1986), the Supreme Court abjured "formalistic and unbending rules" for "determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." Instead, the Court held that determining when a proceeding required an Article III court entailed balancing several factors "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary":

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of

> jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (citing *Thomas*, 473 U.S. at 587, 589–93). This multi-factor standard demanded a certain hierophancy on the part of the lower courts, which had to comb through the Court's inconsistent statements about the metes and bounds of Article III to apply it. But the standard did reflect a pragmatic accommodation of the realities of modern bankruptcy practice and the logistical and administrative difficulty of circumscribing the authority of the bankruptcy courts.

Encouraged by the Supreme Court's retreat from a formalist conception of the public rights exception and the limitations of Article III more generally, we concluded in 1987 that certain controversies at the core of the bankruptcy process implicated public rights. *See In re Mankin*, 823 F.2d at 1308 ("The public rights doctrine in large part simply constitutionalizes the historical understanding of what need and need not be committed to Article III officers for determination. While, as indicated above, it has always been understood that the property rights of creditors cannot be committed exclusively to the political branches for determination, by the same token it has always been understood that bankruptcy proceedings need not be solely determined by Article III officers."). We also held that the portion of bankruptcy-related proceedings that fit within the public rights exception was coextensive

with that portion which had been designated as "core" by the 1984 Act. *Id.*

Today, we acknowledge *Mankin*'s demise.[5] It has been felled by two cases: *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Stern v. Marshall*, which together point ineluctably to the conclusion that fraudulent conveyance claims, because they do not fall within the public rights exception, cannot be adjudicated by non-Article III judges.

In *Granfinanciera*, the Court considered whether a non-claimant to a bankruptcy estate has a Seventh Amendment right to a jury trial when sued by the bankruptcy trustee under 11 U.S.C. § 548 to recover allegedly fraudulent prepetition conveyances. 492 U.S. at 36. Because Congress had designated fraudulent conveyance actions core proceedings, which non-Article III judges could decide, the Court defined the issue as "whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." *Id.* at 50. And that required the Court to again construe the public rights exception, because "Congress may only deny trials by jury in actions at law . . . in cases where 'public rights' are litigated." *Id.* at 51.

Was a fraudulent conveyance proceeding a matter of public right? The Court's answer was, if not unequivocal, at least conclusive: "Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C.

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[5] Because the result in *Mankin* cannot be reconciled with the reasoning in *Stern*, we may overrule it without taking this case en banc. *See Miller* v. *Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

§ 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55. The Court echoed the *Northern Pipeline* plurality's distinction between the (possibly[6]) public-right "restructuring of debtor-creditor relations"—the "core of the federal bankruptcy power"—and the "adjudication of state-created private rights." *Northern Pipeline*, 458 U.S. at 71. Fraudulent conveyance actions, the *Granfinanciera* Court explained, are obviously in the latter category, because they "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." 492 U.S. at 56.

Granfinanciera clarified that fraudulent conveyance actions are not matters of public right, and that a noncreditor retains a Seventh Amendment right to a jury trial on a bankruptcy trustee's fraudulent con-

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[6] Notably, the *Granfinanciera* Court did not decide the question whether even the "restructuring of debtor-creditor relations" was in fact a "public right." 492 U.S. at 56 n.11 ("We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism, and we need not and do not seek to defend it here. Our point is that even if one accepts this thesis, the Seventh Amendment entitles petitioners to a jury trial." (citation omitted)). Neither did the *Stern* Court decide whether the public rights exception constitutionally validates any of the powers that bankruptcy judges today exercise. *See* 131 S. Ct. at 2614 n.7 ("We noted [in *Granfinanciera*] that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.' . . . Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here."). We, of course, follow the Court's example in declining to take up the question.

veyance claim. Some courts, however, seemed disinclined to deduce from those holdings that such litigants also retain a right to be heard by an Article III court. *See, e.g.*, *McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 40 F.3d 763, 770 (5th Cir. 1994), *withdrawn and replaced by* 52 F.3d 1330 (5th Cir. 1995); *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1561 (10th Cir. 1993). *But see Leyh*, 52 F.3d at 1336–37; *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 n.9 (11th Cir. 1990).

Following *Stern*, we can no longer resist *Granfinanciera*'s logic. The issue in *Stern* was whether a bankruptcy court could enter final judgment on a state-law claim for tortious interference with a gift expectancy, which Vickie Marshall had filed as a compulsory counterclaim to Pierce Marshall's proof of claim in her ongoing bankruptcy proceeding. *See* 131 S. Ct. at 2601. The Supreme Court held that it could not, because "Vickie's counterclaim cannot be deemed a matter of 'public right' that can be decided outside the Judicial Branch." *Id.* at 2611. In the course of a lengthy exegesis of its own public-rights precedents, the Court explained that the state-law counterclaim at issue was indistinguishable from the fraudulent conveyance claim in *Granfinanciera*: "Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Id.* at 2614. This common character of the claims in *Granfinanciera* and *Stern* means that neither can be consigned to the bankruptcy courts without doing violence to the constitutional separation of powers:

> What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

Id. at 2615. Here, the Trustee's fraudulent conveyance claims are not matters of "public right," and, *ipso facto*, cannot be decided outside the Article III courts.[7]

Our conclusion is buttressed by the Supreme Court's equation of litigants' Article III rights with their Seventh Amendment jury trial rights in bank-

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[7] Our analysis is unaffected by the Sixth Circuit's recent decision in *Onkyo Europe Electronics GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3 d 705,722 (6th Cir. 2012). There, the Sixth Circuit concluded that it was "crystal clear that the bankruptcy court had constitutional jurisdiction under *Stern* to adjudicate whether the sale of GTI was a fraudulent transfer." *Id.* But it was "crystal clear" because "it was not possible . . . to rule on [the creditor's] proof of claim without first resolving the fraudulent-transfer issue." *Id.* (quoting *Stern*, 131 S. Ct. at 2616). That rendered In re Global "fundamentally unlike" both *Granfinanciera* and our case, "where the bankruptcy estate reached out to file a fraudulent-transfer claim against a party who had filed no claim against the estate." *Id.*

ruptcy-related cases. *Granfinanciera* itself drew the comparison explicitly:

> Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power."

492 U.S. at 53. And the Court in *Stern* characterized cases involving Seventh Amendment jury trial rights as binding authority on the Article III issue. *Stern* described *Granfinanciera*—a case about Seventh Amendment rights—as deciding that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." 131 S. Ct. at 2614 n.7.

The *Stern* Court again transmuted a Seventh Amendment case into an Article III precedent in its analysis of *Langenkamp v. Culp*, 498 U.S. 42 (1990). *Langenkamp* itself stated that the case "present[ed] the question whether creditors who submit a claim

against a bankruptcy estate and are then sued by the trustee in bankruptcy to recover allegedly preferential monetary transfers are entitled to jury trial under the Seventh Amendment." *Id.* at 42–43. On the *Stern* Court's reading, however, *Langenkamp* also decided whether such a claim could be heard in bankruptcy at all: "We explained [in *Langenkamp*] that a preferential transfer claim *can be heard in bankruptcy* when the allegedly favored creditor has filed a claim . . . . If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not 'become [ ] part of the claims-allowance process' subject to resolution by the bankruptcy court." 131 S. Ct. at 2617 (alteration in original) (emphasis added) (quoting *Langenkamp*, 498 U.S. at 45).

Stern fully equated bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with their right to proceed before an Article III judge. Hence, *Granfinanciera*'s statement that "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial" is powerful evidence that Congress also may not deprive such parties of their right to an Article III tribunal. 492 U.S. at 53.

Several *amici* object that the claim at issue in *Stern* was a state-law claim, and that the Trustee's § 548 fraudulent conveyance claim is indistinguishable from the preferential transfer claim at issue in *Katchen v. Landy*, 382 U.S. 323 (1966). *Katchen* held that bankruptcy referees acting under the Bankruptcy Acts of 1898 and 1938 could exercise summary jurisdiction over a voidable preference claim brought by a bankruptcy

trustee against a creditor who filed proof of claim in the bankruptcy proceeding. *Id.* at 329–30, 332–33. The *Stern* Court did distinguish *Katchen* on the grounds that "the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law." 131 S. Ct. at 2618 ("Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding."). And *Granfinanciera* noted that actions to recover preferences are "indistinguishable . . . in all relevant respects" from actions to recover fraudulent conveyances. 492 U.S. at 48–49. There is an argument, then, that bankruptcy courts can render final judgment on a fraudulent conveyance claim whose source of law is the Bankruptcy Code.

That is wrong for two reasons. First, the dispositive distinction between the claims in *Stern* and *Katchen* was that in *Katchen*, the trustee's preference action "would necessarily be resolved in the claims allowance process" because the defendant had filed a proof of claim against the bankruptcy estate. *Stern*, 131 S. Ct. at 2618. The preference action necessarily had to be resolved in the course of deciding whether to allow the defendant's claim on the estate. By contrast, Vickie Marshall's counterclaim in *Stern* required the bankruptcy court to "make several factual and legal determinations that were not disposed of in passing on objections to Pierce's proof of claim for defamation." *Id.* at 2617 (internal quotation marks omitted). "There thus was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim." *Id.* at 2617–18.

Second, a rule that classified any federal-law claim as a "public right" would render *Stern* internally contradictory. Assume that the *Stern* Court's observation that "Vickie's claim . . . is in no way derived from or dependent upon bankruptcy law" was the sole basis by which the Court distinguished the counterclaim in that case from the preference action in *Katchen*. If that were so, the *Stern* Court's characterization of the holding in *Granfinanciera*—that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court," 131 S. Ct. at 2614 n.7—would be incoherent, because the claim in *Granfinanciera* arose under § 548 of the Bankruptcy Code. *See* 492 U.S. at 36.

Granfinanciera involved a federal-law claim, and *Stern* involved a state-law claim. But *Stern* held that both claims required an Article III court. Thus, the only principled basis on which to distinguish *Katchen* from *both Stern* and *Granfinanciera* is that *Katchen* involved a claim against a creditor that necessarily had to be resolved in the course of the claims-allowance process, and *Stern* and *Granfinanciera* did not.

In this case, EBIA is a noncreditor to the BIA bankruptcy estate. Hence, it is not subject to the bankruptcy court's equitable jurisdiction; the trustee can recover monies fraudulently conveyed to it only by initiating a legal action. *Cf. Langenkamp*, 498 U.S. at 45 ("If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer."). That legal action need not necessarily have been resolved in the course of allowing or disallowing the claims against

the BIA estate. For that reason, the claim belonged in an Article III court. *See Stern*, 131 S. Ct. at 2618 ("Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."). That the Trustee asserted a federal-law fraudulent conveyance claim against EBIA is of no moment to our conclusion that the claim is nonadjudicable by a bankruptcy judge.

* * *

Taken together, *Granfinanciera* and *Stern* settle the question of whether bankruptcy courts have the general authority to enter final judgments on fraudulent conveyance claims asserted against noncreditors to the bankruptcy estate. They do not. We now turn to a subsidiary question: whether bankruptcy judges may constitutionally hear such claims, and prepare recommendations for de novo review by the federal district courts.

III

Federal law authorizes bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). Bankruptcy judges have the narrower power to "hear" a proceeding that is "not a core proceeding but that is otherwise related to a case under title 11," and to "submit proposed findings of fact and conclusions of law to the district court" for the entry of final judgment. *Id.* § 157(c)(1).

Our conclusion today creates a gap in this framework: Federal law classifies fraudulent convey-

ance proceedings as "core" proceedings, 28 U.S.C. § 157(b)(2)(H), but the Constitution prohibits bankruptcy judges from entering a final judgment in such core proceedings. Nowhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding; § 157(c)(1) is expressly limited to "non-core" proceedings. Is the power "to hear and determine" capacious enough to include the power to submit proposed findings in a core proceeding? Or are bankruptcy courts impotent to address fraudulent conveyance proceedings, because they fall in the interstices of § 157?

We have noted that Congress enumerated the examples of core proceedings in § 157(b)(2) with "a view toward expanding the bankruptcy court's jurisdiction to its constitutional limit." *Mankin*, 823 F.2d at 1301; *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). With respect to any bankruptcy-related claim, then, the bankruptcy courts must be vested with as much adjudicatory power as the Constitution will bear. In light of this statutory objective, the power to "hear and determine" a proceeding surely encompasses the power to hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. Section 157(b)(1) empowers bankruptcy courts to "hear and determine" fraudulent conveyance claims in a manner consistent with the strictures of Article III—and that includes the more modest power to submit findings of fact and recommendations of law to the district courts.

In sum, § 157(b)(1) provides bankruptcy courts the power to hear fraudulent conveyance cases and to submit reports and recommendations to the district

courts. Such cases remain in the core, and the § 157(b)(1) power to "hear and determine" them authorizes the bankruptcy courts to issue proposed findings of fact and conclusions of law. Only the power to enter final judgment is abrogated.[8]

Our conclusion is consistent with the *Stern* Court's tacit approval of bankruptcy courts' continuing to hear and make recommendations about statutory core proceedings in which entry of final judgment by a non-Article III judge would be unconstitutional. The district court that heard *Stern* before it reached the Supreme Court took the view that the bankruptcy court had lacked the constitutional authority to enter final judgment on Vickie Marshall's counterclaim. *See Stern*, 131 S. Ct. at 2602. For that reason, the district court treated the bankruptcy court's judgment as "proposed[,] rather than final," and reviewed the judgment de novo. *Id.* (alteration in original). Nowhere did the *Stern* Court object to the district court's judgment. Instead, the Court noted that Pierce Marshall "ha[d] not argued that the bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on those matters." *Id.* at 2620 (internal quotation marks omitted). Immediately there-

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[8] In dicta, the Seventh Circuit has implied that bankruptcy courts cannot propose findings of fact and conclusions of law in any proceeding classified as core by § 157. *See Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011). We do not find the *Ortiz* court's analysis of the issue thoroughly reasoned. *See also Waldman v. Stone*, — F.3d — , 2012 WL 5275241, at *8 (6th Cir. Oct. 26, 2012) (observing in dicta that "§ 157(b)(1) authorizes the bankruptcy court to enter appropriate orders and judgments,' not to propose them," but acknowledging that "one might argue that . . . Congress's grant of the greater power to enter final judgments implies a lesser authority to propose them").

after, the Court explained, "We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree . . . that the question presented here is a 'narrow' one." *Id.* Stripping the bankruptcy courts of the power to entertain state-law counterclaims in *any* capacity would have roiled the prevailing bankruptcy schema. The Court was surely suggesting that bankruptcy courts were *not* "barred from hearing all counterclaims or proposing findings of facts and conclusions of law on those matters." *Id.* (internal quotation marks omitted); *see also Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman)*, 464 B.R. 348, 355–56 (N.D. Cal. 2011) (noting the near-universal approbation by district courts and bankruptcy courts of the view that *Stern* permits bankruptcy courts to submit reports and recommendations in bankruptcy-related proceedings even when the entry of final judgment is unconstitutional).

For these reasons, we conclude that bankruptcy courts have statutory authority to hear and enter proposed findings of fact and conclusions of law in a fraudulent conveyance proceeding asserted by a bankruptcy trustee against a noncreditor, subject to de novo review by a federal district court.

IV

Several *amici* contend that even if defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable. We agree, and hold that EBIA waived its right to an Article III hearing.

The waivable nature of the allocation of adjudicative authority between bankruptcy courts and Arti-

cle III courts is well established. Prior to the Bankruptcy Act of 1978, federal law distinguished between "summary" matters, which involved property in the actual or constructive possession of the court, and "plenary" matters, which did not. *See Northern Pipeline*, 458 U.S. at 53. Bankruptcy referees were vested with jurisdiction over summary matters, but plenary suits could only be tried by an Article III judge. But the right to an Article III judge in plenary proceedings could be waived by the litigants. *See MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 267 (1932).

Following the genesis of the modem bankruptcy system, the Supreme Court clarified that "Article III, § l's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal, rather than structural, interests." *Schor*, 478 U.S. at 848.[9] *Stern* further made clear that § 157 "does not implicate questions of subject matter jurisdiction." 131 S. Ct. at 2607. Accordingly, "as a personal right, Article III's guarantee of an impartial and

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[9] *Schor* did hold that "notions of consent and waiver cannot be dispositive" of Article III problems when "the encroachment or aggrandizement of one branch at the expense of the other" is at stake, because in such cases structural principles are implicated in addition to private rights entitlements. 478 U.S. at 850–51, 860 (internal quotation marks omitted). In fact, that was the case in *Schor*, because the case involved whether an Executive Branch administrative agency could adjudicate a state-law counterclaim. *Id.* at 852. But the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are "officer[s]" of the district court and are appointed by the Courts of Appeals. *See* 28 U.S.C. § 151, 152(a)(1).

independent federal adjudication is subject to waiver."[10] *Schor*, 478 U.S. at 848; *see also Daniels-Head & Assocs. v. William M. Mercer, Inc. (In re Daniels-Head & Assocs)*, 819 F.2d 914, 918 (9th Cir. 1987). And in fact, § 157(c)(2) expressly provides that bankruptcy courts may enter final judgments in non-core proceedings "with the consent of all the parties to the proceeding." 28 U.S.C. § 157(c)(2).

If consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment. The only question, then, is whether EBIA did in fact consent to the bankruptcy court's jurisdiction.

We have previously held that a bankruptcy litigant impliedly consents to the bankruptcy court's jurisdiction when he fails to timely object. In *In re Daniels-Head*, 819 F.2d at 919, we held "that appellant's failure to object to the bankruptcy court's jurisdiction constitutes consent to that jurisdiction." Similarly, in *Mann v. Alexander Dawson Inc. (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990), we held that a debtor's decision to file an adversary proceeding in bankruptcy court, and his failure to object to the court's jurisdiction

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[10] The same principle permits federal magistrate judges, acting with the consent of the litigants, to enter final judgments in proceedings that would otherwise be the exclusive province of Article III courts. *See* 28 U.S.C. § 636(c)(1); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) ("We hold that consensual reference of a civil case to a magistrate is constitutional . . . ."). And consent to a magistrate judge's case-dispositive authority may be implied from a litigant's actions. *See Roell v. Winthrow*, 538 U.S. 580, 586–87 (2003).

prior to the time it rendered judgment against him, meant that "he consented to the court's jurisdiction." *Id.*

This case, of course, is somewhat different, because the Trustee, not EBIA, initiated the adversary proceeding. But EBIA's conduct bore considerable indicia of consent. EBIA initially demanded a jury trial, invoking its rights under *Granfinanciera*, which the district court treated as a motion to withdraw the reference. *See* Defs.' Answer at 14, *In re Bellingham Ins. Agency*, No. 06-11721 (Bankr. W.D. Wash. Aug. 2, 2008), ECF No. 169; Mot. to Withdraw the Reference, *Arkison v. Exec. Benefits Ins.*, No. 10-cv-00171 (W.D. Wash. Jan. 28, 2010), ECF No. 1. But EBIA elected not to pursue a hearing in an Article III court. Instead, EBIA petitioned the district court to stay its consideration of the motion to withdraw the reference to give the bankruptcy court time to adjudicate the Trustee's motion for summary judgment. *See Order, Arkison v. Exec. Benefits Ins.*, No. 10-cv-00171 (W.D. Wash. Mar. 26, 2010), ECF No. 5. In other words, EBIA did not simply fail to object to the bankruptcy judge's authority to enter final judgment in the fraudulent conveyance action; it affirmatively assented to suspend its demand for a jury trial in district court to give the bankruptcy judge an opportunity to adjudicate the claim.

A month later, the bankruptcy court entered summary judgment in Arkison's favor. EBIA abandoned its motion to withdraw the reference, and the district court dismissed the action. *See Order, Arkison v. Exec. Benefits Ins.*, No. 10-cv00171 (W.D. Wash. July 2, 2010), ECF No. 8. EBIA then separately appealed the bankruptcy court's judgment in the district court

for the Western District of Washington. EBIA did not argue at any point during that appeal that the bankruptcy court lacked authority to issue a final judgment in the fraudulent conveyance action. In fact, EBIA did not raise a constitutional objection to the bankruptcy court's entry of final judgment in favor of the Trustee until after the briefing in this appeal was complete, when it filed a motion to vacate the bankruptcy court's judgment on the eve of oral argument. Because EBIA waited so long to object, and in light of its litigation tactics, we have little difficulty concluding that EBIA impliedly consented to the bankruptcy court's jurisdiction. *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944))). *Cf. In re Ortiz*, 665 F.3d at 909–10, 915 (refusing to find implied consent to a bankruptcy judge's authority where the debtors moved for the bankruptcy judge to abstain from jurisdiction and petitioned the district court to withdraw the reference from the bankruptcy judge).

There are two potential objections to our conclusion that EBIA impliedly consented to the bankruptcy judge's authority. The first is that Federal Rules of Bankruptcy Procedure 7008 and 7012, which implement the statutory core/non-core dichotomy, preclude a finding of implied consent. These rules provide that an adversary proceeding complaint "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy

judge"; a similar requirement applies to responsive pleadings. *See* Fed. R. Bankr. P. 7008(a), 7012(b). A 1987 advisory committee note to Rule 7008 provides that "only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding."

We have subsequently held, however, that a litigant's actions may suffice to establish consent. *See In re Mann*, 907 F.2d at 926; *accord In re Tex. Gen. Petroleum Corp.*, 52 F.3d at 1337; *Abramowitz v. Palmer*, 999 F.2d 1274, 1280 (8th Cir. 1993); *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 403 (4th Cir. 1992).

Indeed, *Roell*—decided in 2003—precludes any objection on the basis of the bankruptcy rules. 538 U.S. at 586. At the time *Roell* was decided, Federal Rule of Civil Procedure 73(b) specified that if parties consented to a magistrate judge's dispositive power over their case, their consent was required to "be memorialized in 'a joint form of consent or separate forms of consent setting forth such election.'" 538 U.S. at 586 (quoting Fed. R. Civ. P. 73(b) (2003)). The Federal Magistrate Act, however, stated only that "[u]pon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1). Noting that "§ 636(c)(1)[ ] speaks only of 'the consent of the parties,' without qualification as to form," the Court held that implied consent could satisfy the statute,

notwithstanding the specific procedure described in Rule 73(b). *Roell*, 538 U.S. at 586.

Like the provision of the Federal Magistrate Act at issue in *Roell*, the text of § 157(c) only requires consent simpliciter. *See* 28 U.S.C. § 157(c)(2) (requiring "the consent of all the parties to the proceeding"). By contrast, § 157(e) permits bankruptcy judges to conduct jury trials "with the *express* consent of all the parties" (emphasis added). The adjectival distinction suggests that Congress intended to allow parties to consent by their actions to the authority of bankruptcy courts to enter dispositive orders on any bankruptcy-related claim. Accordingly, in cases like this one—in which the defendant was aware of its right to seek withdrawal of the reference but opted instead to litigate before the bankruptcy court—consent is established.

The second potential objection is that *Stern* was not decided until EBIA's appeal was pending before this court. True, but EBIA had ample reason to be alert to the possible jurisdictional problem. We published *Marshall v. Stern*, 600 F.3d 1037 (9th Cir. 2010), on March 19, 2010, before EBIA asked the district court to stay its motion to withdraw the reference. That predicate opinion featured a lengthy perscrutation of the Article III question. Although we reached a different set of conclusions than the Supreme Court ultimately did, the opinion should have been sufficient to alert EBIA to the possible jurisdictional problem. The same is true of *Granfinanciera*, which thoroughly foreshadowed the result in *Stern*. And we know that EBIA' s counsel was aware of *Granfinanciera*, because the company asserted—and then abandoned—the very Seventh Amendment right that case established.

Further, the *Stern* Court applied the doctrine of litigant consent even when little authority existed to notify the litigant that a constitutional objection was there for the making. In *Stern*, Pierce Marshall propounded the novel argument that the bankruptcy court lacked jurisdiction to enter final judgment on his defamation claim because § 157(b)(5) granted to district courts exclusive jurisdiction over "personal injury tort" claims. 131 S. Ct. at 2606. The Court held that Pierce consented to the bankruptcy court's jurisdiction over the claim when he failed to timely object. *Id.* at 2608. By contrast, Pierce voiced his objection to the bankruptcy court's jurisdiction over Vickie's counterclaim from the outset of the litigation. *See id.* at 2601.

Although EBIA may not be as sophisticated or creative as Pierce, it fully litigated the fraudulent conveyance action before the bankruptcy court and the district court, without so much as a peep about Article III—even going so far as to abandon its motion to withdraw the reference. "[T]he consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be . . . severe." *Id.* at 2609 (internal quotation marks, alterations, and citations omitted). Having lost before the bankruptcy court, EBIA cannot assert a right it never thought to pursue when it still believed it might win. *Id.*

V

Because we conclude that EBIA consented to the bankruptcy court's jurisdiction, we proceed to the merits of that judgment.

A

The district court affirmed the bankruptcy court's grant of summary judgment on the claim that the transfer of BIA' s assets to EBIA constituted a fraudulent transfer. *See* 11 U .S.C. § 548. Section 548 empowers the trustee to avoid a transfer of the debtor's property, or any obligation incurred by the debtor, that was fraudulently made or incurred within two years of the bankruptcy petition. A trustee may exercise the avoidance power when the transfer was actually intended to hinder, delay, or defraud a creditor. *Id.* § 548(a)(1)(A). Even in the absence of actual fraudulent intent, the trustee can avoid a "constructively" fraudulent transfer: one that was made in exchange for less than "reasonably equivalent value" at a time when the debtor was insolvent. *Id.* § 548(a)(1)(B).

The district court held that the trustee satisfied all elements of a constructively fraudulent transfer, because BIA transferred to EBIA all of its assets when EBIA began operating in February 2006, including its phone number, book of business, and especially its stream of insurance commissions. BIA received nothing in return.

EBIA's only defense is that it received no items of value from BIA prior to the filing of the bankruptcy petition. EBIA argues first that any commission streams that changed hands were transferred to the related entity ARIS, not to EBIA, and second that eve-

rything else that was transferred was either a liability or an asset with negligible value.[11]

EBIA's assertions are belied by the record. EBIA is correct that the Trustee's expert accountant, Michael Quackenbush, testified that $373,291.28 was deposited into an account held jointly by ARIS and EBIA. But, as the district court correctly noted, those commissions were credited to EBIA via intercompany transfers in the accounting software. The evidence that this money was transferred from BIA to EBIA is overwhelming. BIA executed a written assignment of its commissions from a major client to an employee, Peter Pearce, who immediately became an EBIA employee upon BIA's dissolution. Pearce deposited $123,133.58 into the ARIS/EBIA account. And EBIA itself deposited more than $250,000 in additional commissions that obviously belonged to BIA.

EBIA is entitled to any reasonable inference that would suggest an explanation of the provenance of these sums other than the one the Trustee proposes. *See Bodett v. CoxCom, Inc.*, 366 F.3d 736, 742 (9th Cir. 2004). But EBIA makes no serious attempt to offer a nonfraudulent explanation. EBIA's only rebuttal evidence is the declaration of erstwhile BIA CEO Nicholas Paleveda, who claims that the commissions Pearce deposited into the account belonged to Pearce personally. In his declaration, he also asserts that the remaining quarter-million dollars of commissions credited to EBIA between January 1 and June 1 came from new

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[11] EBIA's piteous examples of such assets include "unemployed actuaries" and "a lease arrangement . . . for an office that no clients visited." Appellant's Opening Br. 9.

business that the company drummed up without relying on BIA's old business relationships.

Both claims are incredible. Property of the estate includes intangible assets, such as corporate goodwill and a "book of business." *See Stoumbos v. Kilimnik*, 988 F.2d 949, 963–64 (9th Cir. 1993). The transfer of an ongoing business concern can constitute a fraudulent transfer. *See, e.g., id.* The Trustee produced to the bankruptcy court the document assigning the commissions from BIA's client American National to Pearce, and various witnesses testified that Pearce's role at BIA was to act as a conduit for commissions between the company and its clients. Further, Paleveda stated that EBIA did not earn any revenue until May 2006. Paleveda thus suggests that in a matter of weeks—from May to June 1—EBIA earned hundreds of thousands of dollars of new commissions that were unrelated to BIA's old business.

Put simply, there is no genuine dispute of material fact that these transfers were constructively fraudulent and recoverable by the Trustee under § 548. *See Stoumbos*, 988 F.2d at 953.

The bankruptcy court also granted summary judgment on the Trustee's claim that EBIA violated Washington's Uniform Fraudulent Transfer Act, Wash. Rev. Code §§ 19.40.011–19.40.904. The definition of a constructively fraudulent transfer under the Washington Uniform Fraudulent Transfer Act is essentially identical to the definition of a constructively fraudulent transfer under § 548 of the Bankruptcy Code. It is any transfer that is made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation" while the debtor:

> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Id. § 19.40.041(a)(2).

EBIA does not argue in its briefs that we ought to distinguish between the state- and federal-law causes of action. We therefore conclude that the district court properly affirmed the bankruptcy court's grant of summary judgment on the Trustee's state-law constructive fraudulent transfer claim.

The district court also concluded that the Trustee adduced sufficient evidence to demonstrate actual fraudulent intent by BIA. Our conclusion that the transfers to EBIA were constructively fraudulent under Washington law is a sufficient basis on which to affirm the judgment. *See Thompson v. Hanson*, 219 P.3d 659, 664 (Wash. 2009). Hence, we need not reach the question of whether the transfers were actually fraudulent.

B

In addition to addressing the Trustee's fraudulent conveyance claims, the bankruptcy court granted summary judgment on the Trustee's claim that EBIA was a successor corporation of BIA, and therefore liable for the latter's debts. We agree that EBIA is BIA's successor.

The rule in Washington is that "a corporation purchasing the assets of another corporation does not become liable for the debts and liabilities of the selling corporation." *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 209 P.3d 863, 868 (Wash. 2009). An exception is made, however, when "the purchaser is a mere continuation of the seller." *Id.* (internal quotation marks omitted). Several factors dictate whether a business is a "mere continuation" of its predecessor, including "a common identity between the officers, directors, and stockholders of the selling and purchasing companies, and the sufficiency of the consideration running to the seller corporation in light of the assets being sold." *Id.* The nub of the inquiry is whether "the purchaser represents merely a 'new hat' for the seller." *Cashar v. Redford*, 624 P.2d 194, 196 (Wash. Ct. App. 1981) (internal quotation marks omitted).

EBIA marshals a variety of facts in an attempt to prove that the two companies are authentically distinct entities. For instance, EBIA notes that none of BIA's seven shareholders became EBIA shareholders. EBIA also adopted a radically different business image, including a "completely different name" and a new logo and website Finally, EBIA remarks that its business model represents a sea change from BIA's, because BIA focused exclusively on 412(i) retirement plans, while EBIA traffics in a broader range of defined-benefit retirement plans.

EBIA is indulging in what Freud called the narcissism of minor differences.[12] EBIA's statement that there were no common shareholders between the two entities is technically true but deeply misleading.

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[12] SIGMUND FREUD, ON SEXUALITY 272 (Penguin ed. 1991).

Paleveda was the sole owner of EBIA and the CEO of BIA prior to EBIA's incorporation; his wife, Marjorie Ewing, owned eighty percent of BIA. Because a "common identity of the officers, directors, and stockholders" is the "crucial factor" in the "mere continuation" judgment, *Cashar*, 624 P.2d at 196, the fact that the same married couple owned and operated both BIA and EBIA is virtually dispositive. In any case, a variety of other factors militate in favor of a finding of successor liability. The core employees remained the same, there was no consideration paid for BIA's transfer of assets, and the essential business—marketing and selling defined-benefit plans funded by insurance policies—remained the same. *Cf. Cambridge Townhomes*, 209 P.3d at 869.

Weighed against these fundamental commonalities, minor divergences like the company names, logos, and websites are immaterial. The evidence shows that EBIA was nothing more than a "new hat" for Paleveda and Ewing. The bankruptcy court correctly granted summary judgment to the Trustee on the issue of successor liability.

VI

Fraudulent conveyance claims are "quintessentially suits at common law" designed to "augment the bankruptcy estate." *Granfinanciera*, 492 U.S. at 56. Thus, Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties' consent. But here EBIA consented to the bankruptcy court's jurisdiction, rendering

that court's entry of summary judgment in favor of the Trustee constitutionally sound. That judgment was also correct.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Plaintiff/Appellee,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A.R.I.S., NICHOLAS PALAVEDA, MARJORIE EWING, PETER PEARCE and JANE DOE PEARCE,
Defendants/Appellants.

Case No. 10-929 MJP

ORDER

This matter comes before the Court on Appellant Executive Benefits Agency's appeal of the Bankruptcy Court's entry of judgment against it and five other defendants in an adversary proceeding. (Dkt. No. 7.) Having reviewed the motion, the response (Dkt. No. 12), the reply (Dkt. No. 13), and all supporting papers, the Court DISMISSES the appeal.

Background

Appellee Peter Arkison, the Trustee for the debtor, Bellingham Insurance Agency, Inc. ("BIA"), filed an adversary complaint against Appellant Execu-

tive Benefit Insurance Agency ("EBIA"), A.R.I.S. Inc. ("ARIS"), Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce (collectively "Defendants") on May 31, 2008. (ER 1-24.) The complaint accused Defendants of engaging in preferential and fraudulent transfers from the debtor, BIA. The Trustee argued that Defendants sought to avoid paying BIA's debts owed to certain creditors by closing down BIA and opening up a new company, EBIA, that was a mere continuation of BIA that received the accounts due to BIA and used the same office space as BIA. The Trustee filed a motion for summary judgment, which the Bankruptcy Court granted.

Prior to its closure, BIA sold and marketed 412(i) insurance plans. It worked closely with its affiliated company, ARIS, which provided plan design and retained the sole responsibility for maintaining the insurance plans BIA sold. (ER 38-39, 51-53.) ARIS and BIA were closely related companies. Nicholas Paleveda was the sole director and CEO of BIA from its inception through February 14, 2006. (ER 145.) His wife, Majorie Ewing, owns eighty percent of the shares of BIA, and became the sole director of BIA after Paleveda resigned on February 14, 2006. (ER 45, 145.) Ewing also runs and owns ARIS. ARIS and BIA shared office space until January 31, 2006, and testimony of the Trustee's CPA shows that ARIS and BIA shared finances. (ER 65; ER 132; Dkt. No. 14-2 at 8-11.) Peter Pearce, one of the defendants in the adversary proceeding, is also a shareholder of BIA, as well as the licensed Washington insurance agent who was employed by BIA. (Id.; ER 281-83.) He worked for both BIA and ARIS and received a single paycheck for work done for both companies. (ER 118.)

On January 31, 2006, BIA ceased operations and the following day Nicholas Paleveda commenced operations of a new company, Executive Benefits Insurance Agency ("EBIA") in the same office building. He remained CEO of BIA until February 14, 2006, when his wife, Ewing, took over. (ER 145.) EBIA had a very similar website to BIA's website. EBIA used the same phone number as BIA and it worked with ARIS in much the same manner BIA worked with ARIS. By the time EBIA was formed, BIA was insolvent. (ER 137.)

Prior to BIA closing, BIA, ARIS, Ewing, Paleveda, and Pearce arbitrated a dispute involving three individuals who sought money from them (collectively the "Arbitration Victors"). The proceedings ultimately resulted in a judgment against BIA, ARIS, Ewing, Paleveda, and Pearce in the amount of $104,212.42. (ER 256-57.) On November 21, 2005, the arbitrator issued a temporary award to the Arbitration Victors, and on February 3, 2006, he issued a final reasoned award. (ER 401, 404, 198.) Three days prior to the final reasoned award, BIA ceased to operate and the next day EBIA picked up where BIA left off.

In an effort to enforce their judgment, the Arbitration Victors issued writs of garnishment against several insurance companies with which BIA did business and which were believed to owe BIA money. (See ER 260-64.) One of these companies was American National Insurance Company ("ANICO"). In response to the writ of garnishment, ANICO stated that "our records indicate that Bellingham Insurance Agency, Inc. has an absolute assignment set up with Peter Pearce," and refused to satisfy the writ. (ER 265.) The Trustee

argued that this inquiry revealed that the Defendants used Pearce to try to hide BIA's assets from the creditors. Pearce served as the agent of record for BIA, and he took the commissions assigned to him and deposited them into an ARIS account. (ER 130, 293-96.) Common accounting software shows that ARIS and EBIA shared the deposits made by Pearce after the arbitration award was issued in February 2006. (ER 456-58.) These transfers are alleged to have been fraudulent and a means to hide assets of BIA after EBIA was formed to replace it.

On June 2, 2006, the Arbitration Victors filed suit in Whatcom County Superior Court to recover the transfers made by the Defendants. (ER 417-24.) The court granted a TRO and a writ of attachment on June 6, 2006. (ER 447-48.) BIA filed for bankruptcy on June 1, 2006. The Trustee then filed an adversary proceeding against Defendants and filed for summary judgment on March 17, 2010. (Dkt. No. 8.) In response to the motion, Defendants filed only one declaration from Nicholas Paleveda. This is the sole evidence on which the Defendants relied to oppose summary judgment. On April 14, 2010, the Bankruptcy Court granted the motion in favor of the Trustee. (ER 449-54.) The Court ruled that Appellant had engaged in fraudulent transfers and that EBIA was a mere successor to BIA.

Analysis

A. Deficiencies in Appeal Record

Appellant failed to file any excerpts of record, as required by Local Bankruptcy Rule 8006-1. It is a simple proposition that without a record to review, a court cannot determine whether there is merit to an appeal. The Court is surprised by Appellant's failure to abide

by this basic rule. Appellee requests the Court sanction Appellant for this failure, including striking the brief and dismissing the appeal. However, given that Appellee did file excerpts of record, the Court has sufficient basis to review the appeal, which lacks merit. The Court does not strike the opening brief or dismiss the appeal for Appellant's failure to abide by Rule 8006-1.

B. Standard

The Court reviews the Bankruptcy Court's order de novo. In re Caneva, 550 F.3d 755, 760 (9th Cir. 2008). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that, "under the governing substantive law . . . could affect the outcome of the case." Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003). When reviewing the record, all "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). However, self-serving declarations that lack detailed facts or supporting evidence are insufficient to raise a genuine issue of material fact. See Sec. Exchange Comm'n v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1089 (9th Cir. 2010).

C. Avoidance Claim

As was the case in the Bankruptcy Court, Appellant has failed to raise any dispute of fact that might preclude entry of judgment on the Trustee's avoidance claim. There is no basis to reverse the Bankruptcy Court's decision on this issue.

A Trustee may seek to avoid transfers made within one year of the date of the bankruptcy filing where the insolvent Debtor received less than reasonably equivalent value in the exchange. 11 U.S.C. § 548(a)(2). "Value is defined for purposes of section 548 of the Code as 'property, or satisfaction or securing of a present or antecedent debt of the debtor. . . ." In re United Energy Corp., 944 F.2d 589, 595 (9th Cir. 1991) (quoting 11 U.S.C. § 548(d)(2)(A)). The Second Circuit has noted that the term "reasonably equivalent value" means more than the "consideration" necessary to support a contract. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991 (2d Cir. 1981). "Reasonable equivalence" requires a comparison of the value of what went out with the value of what was received. In re Grabill Corp., 121 B.R. 983, 994 (Bankr. N.D. 111. 1990). The intent of the person causing the transfer is irrelevant if the Trustee can demonstrate the Debtor received less than reasonably equivalent value. Id.

The Trustee has satisfied all elements of § 548(a)(2). First, the transfers of items of value from BIA to EBIA were made within one year of the bankruptcy action. The transfers occurred in February 2006 and the bankruptcy was filed in June 2006. Second, BIA was insolvent on the date of the transfers. (ER 137.) Third, the evidence shows that commissions owed to BIA were routed through Peter Pearce, into ARIS's

joint account that was shared with EBIA. The accounting spreadsheet for ARIS showed that after BIA ceased to operate, Pearce deposited the BIA commissions into the ARIS account, which was shared with EBIA. (See Dkt. No. 13-1 at 5.) ARIS is entirely owned by Marjorie Ewing, who is not only the wife of Paleveda, but also became the CEO of BIA after EBIA was created. Indeed, there was little distinction between ARIS and BIA, with employees splitting time between the two companies and yet receiving one pay check for work done for both companies. (See ER 109.) Appellant attempts to controvert these facts with a self-serving statement from Defendant Paleveda that he did "not know whether Peter Pearce deposited any of his commissions into the ARIS accounts" and that "[i]f this is true, it is a clerical error." (Dkt. No. 7 at 9.) This conjecture does not controvert the accounting records that show the transactions moved BIA's accounts receivable to EBIA at the expense of BIA's creditors. The Bankruptcy Court did not err in making this determination. The Court DISMISSES the appeal of this claim.

D. Fraudulent Transfer

Appellant has failed to show any error in the Bankruptcy Court's grant of summary judgment on the Trustee's fraudulent transfer claim.

State law provides a cause of action similar to 11 U.S.C. § 548(a)(2), permitting the avoidance of fraudulent transfers. RCW 19.40.041 states that a transfer or obligation incurred by a debtor is fraudulent if:

> the debtor made the transfer or incurred the obligation:

> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) Without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

RCW 19.40.041(a). The Court may consult eleven factors to determine whether there is actual intent to hinder, delay, or defraud any creditor of the debtor. RCW 19.40.041(b). The creditor may obtain avoidance of fraudulent transfers to the extent necessary to satisfy the creditor's claim. RCW 19.40.071(a).

As the Trustee correctly points out, a finding of avoidance under § 548 of the Bankruptcy Code supports a finding under RCW 19.40.041. As explained above, the transfers here were made without the giving of reasonably equivalent value at a time when BIA was insolvent. Thus the Trustee satisfied the elements of RCW 19.40.041(a)(2), showing the transfers were fraudulent. In addition, the Trustee has shown that seven of the eleven factors in RCW 19.40.041(b) favor a finding of actual intent to hinder the creditor's recovery of money owed. (Dkt. No. 12 at 24.) First, the transfer was made through an insider, Peter Pearce, to another

insider ARIS, and ultimately to EBIA, yet another company closely connected to BIA's ownership. RCW 19.40.041(b)(1). Second, BIA retained constructive control of the property by using Pearce to move the money to ARIS and then to EBIA. RCW 19.40.041(b)(2). ARIS and EBIA/BIA were really mutually controlled by the Defendants. Third, the transfers were not disclosed to the creditors, which is evidence of intent to conceal. RCW 19.40.041(b)(3). Fourth, at the time of the transfers, BIA had been sued and owed a substantial judgment to the Arbitration Victors. RCW 19.40.041(b)(4). Fifth, the transfers involved a large amount of the debtor's assets—its accounts receivable. RCW 19.40.041(b)(5). Sixth, the debtor was insolvent at the time the transfer was made. RCW 19.40.041(b)(9). Seventh, the transfer happened shortly after a large judgment was entered against the Debtor on February 3, 2006. RCW 19.40.041 (b)(l0). Together these facts weigh in favor of a finding of a fraudulent transfer under RCW 19.40.041(a)(1).

Appellant has done nothing to point out where in the record contradictory facts exist. It attempts to argue that EBIA received nothing from BIA and that it was an entirely different business. This is supported only by Defendant Paleveda's self-serving declaration, which, as explained above, fails to raise a genuine issue of material fact. The Court DISMISSES the appeal of this claim.

E. Mere Continuation

Appellant spends much of its briefing on the question of whether EBIA is a "mere continuation" of BIA. There was no error in the Bankruptcy Court's conclusion on this matter.

When a company sells its assets to another corporation, the purchasing corporation normally does not become liable for the seller's debts. Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 135 Wn.2d 894, 901 (1998). If the buying corporation is a "mere continuation" of the seller or if the transfer of assets is for a fraudulent purpose to escape liability, then liability may be imposed on the new corporation. Id.

There is substantial evidence supporting that Bankruptcy Court's conclusion that EBIA is a mere continuation of BIA. First, Nicholas Paleveda is the sole owner of EBIA and immediately prior to EBIA's creation, he was the CEO of BIA. (ER 463.) Second, EBIA was formed the day after BIA ceased operations. Third, Paleveda replaced himself at BIA with his wife, Ewing. Fourth, EBIA contains the same key employees as BIA did: Pearce, Ewing, and Paleveda. (ER 429.) Fifth, EBIA took over the same office space and telephone line as BIA, while its website is nearly identical to BIA's. (ER 430.) Sixth, EBIA and ARIS shared the same accounting as did ARIS and BIA. Seventh, EBIA obtained the accounts receivable for BIA on several outstanding commissions. Eighth, several employees testified that the companies were virtually the same. One employee, John Bremer, stated that the company stayed the same after it changed name to EBIA. (ER 33-34.) Peter Pearce also testified that the same employees worked for EBIA as BIA. (ER 118.)

These facts support the finding that EBIA was a mere continuation of BIA.

Appellant argues that EBIA did not open a bank account until May, 2006 and that no commissions were received until May 2006. This contention is made only by Paleveda in his self-serving declaration. The weight of the evidence shows this not to be the case. For example, Pearce testified that he always assigns all of the commissions to BIA and that he did not take the commissions for himself. (ER 428.) Those commissions were then deposited by Pearce into ARIS's joint account, shared with EBIA. The accounting spreadsheet shows that EBIA was receiving commissions funneled from Pearce to ARIS well before May, 2006. Even if the Court assumes Paleveda is correct that EBIA did not earn any commissions until May 2006, then it only reinforces the fact that the money deposited by Pearce into the ARIS/EBIA account was derived from commissions that were not owed to EBIA. This fails to aid Appellant's position. Appellant fails to raise a plausible basis for reversal on this issue. The Court DISMISSES the appeal.

Conclusion

Appellant has done nothing to show any defect in the Bankruptcy Court's grant of summary judgment. Procedurally, Appellant has done everything to hinder the Court in assessing the merits of the appeal. On the merits, Appellant has failed to show any dispute of material fact in the record that could possibly support the reversal of the Bankruptcy Court's order. The Court DISMISSES the appeal and AFFIRMS the Bankruptcy Court.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 21st day of January, 2011.

/s/ Marsha J. Pechman

Marsha J. Pechman
United States District
Judge

APPENDIX C

Entered On Docket May 27, 2010

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN RE:
BELLINGHAM INSURANCE AGENCY, INC.,
DEBTOR.

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, ET AL.,
Defendants.

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, ET AL.,
Defendant.

Bankruptcy No. 06-11721

Adversary No. 08-1132

JUDGMENT

Judgment Debtor:	Executive Benefits Insurance Agency, dba Executive Benefits Design Group, Inc.
Judgment Creditor:	Peter Arkison, Chapter 7 Trustee for the Bankruptcy Estate of Bellingham Insurance Agency, Inc.
Attorneys for Plaintiff:	Denice E. Moewes Wood & Jones, P.S. 303 N. 67th Street Seattle WA 98103-5209
Principal Judgment Amount	$373,291.28
Filing Fee	$ 250.00
Interest from date of complaint to May 26, 2010 at 2.14%	$ 15,933.08
TOTAL JUDGMENT AMOUNT	$389,474.36

THIS MATTER having been commenced on May 31, 2008 by the Chapter 7 Trustee/Plaintiff; the Plaintiff filed a Motion for Summary Judgment which was granted. Based upon the entry of the Order Granting Summary Judgment; it is hereby:

ORDERED ADJUDGED AND DECREED that Peter Arkison, the Chapter 7 Trustee for the Bankruptcy estate of Bellingham Insurance Agency, Inc., is hereby awarded judgment against Defendant Executive Benefits Insurance Agency dba Executive Benefits Design Group in the amount of $389,474.36.

The judgment shall bear interest at the rate of .38% per annum from the date of the entry of this judgment forward, until paid in full; and it is further

ORDERED ADJUDGED AND DECREED that the Defendant Executive Benefits Insurance Agency dba Executive Benefits Design Group, Inc., is a mere successor to the debtor and therefore remains liable for the allowed debts of the debtor, however, the Trustee shall credit any payments received by the Trustee on this judgment against the liability of Executive Benefits Insurance Agency dba Executive Benefits Design Group, Inc. for the allowed debts of the debtor.

DATED this _____ day of May, 2010.

/s/ Thomas T. Glover
Thomas T. Glover
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

Presented by:

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Plaintiff Peter Arkison
Chapter 7 Trustee

APPENDIX D

Entered On Docket May 27, 2010

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON

In Re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

Bankruptcy No. 06-11721

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, Et Al.,
Defendants.

Adversary No. 08-1132

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT TO RECOVER FRAUDULENT TRANSFERS SOLELY AS TO DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY AND TO IMPOSE SUCCESSOR LIABILITY FOR ALLOWED DEBT OF DEBTOR

THIS MATTER came before the Court on April 14, 2010 on the Trustee's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant Executive Benefits Insurance ("Plaintiff's SJ Motion"); the Court finding that the Plaintiff's SJ Motion, and all supporting docu-

ments was timely given and was in compliance with the Bankruptcy Code and Rules and Local Rules, the Court having considered the Plaintiff's SJ Motion and supporting declarations and the Objection thereto filed by Defendant Executive Benefits Insurance Agency and the supporting declaration, and having heard the oral argument of the parties, and noting that Plaintiff moved for summary judgment under two separate causes of action - - 1) that certain transfers were fraudulent in nature and 2) that Executive Benefits Insurance Agency, dba Executive Benefits Design Group, Inc. is a mere successor of the debtor, and deeming itself fully informed in the matter, now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED that the Plaintiff's SJ Motion is GRANTED on both causes of action on which the Trustee moved for summary judgment.

Dated this ___ day of May, 2010.

/s/ Thomas T. Glover
Thomas T. Glover
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

Presented by:

Wood & Jones, P.S.
/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Chapter 7 Trustee
Peter Arkison

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed November 4, 2011

No. 11-35162

In the Matter of: BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY
Appellant,

v.

PETER H. ARKISON, TRUSTEE, solely his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Appellee.

D.C. No. 2:10-cv-00929-MJP
Western District of Washington, Seattle

ORDER

Before: KOZINSKI, Chief Judge, PAEZ, Circuit Judge, and COLLINS, District Judge.*

The court invites supplemental briefs by any amicus curiae addressing the following questions: Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?

Any briefs responding to this order shall be filed no later than thirty days from the filed date of this order. All briefs shall comply with the page or type-volume limitations specified in Federal Rules of Appellate Procedure 29(d) and 32(a)(7). Any person or entity wishing to file a brief as an amicus curiae in response to this order is granted leave to do so pursuant to Federal Rule of Appellate Procedure 29(a).

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

PETER ARKISON, in his capacity as Chapter 7 trustee,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., et al.,
Defendants.

CASE NO. C10-171RAJ

BKRPTCY NO. 06-11721

ADVERSARY NO. 08-1132TTG

ORDER

This matter comes before the court on a motion to withdraw the reference. Dkt. # 1. The motion was created when the Bankruptcy Court entered an order on December 30, 2009, directing that trial in this matter be referred to a United States District Court Judge.

In a March 26, 2010 order, this court directed the parties to file a joint status report on the need to try this matter no later than June 15, 2010. The court issued that order because no party was certain that trial would be necessary.

No party complied with the June 15 deadline. On June 22, the court issued an order to show cause why this action should not be dismissed. The sole response to that order came on June 30 from Peter Arkison, the trustee of the bankruptcy estate. He stated that the Bankruptcy Court had entered summary judgment against the sole Defendant who had sought to withdraw the reference. No other party expressed an interest in trying this matter in this court.

Finding no party in favor of withdrawing the reference, the court DENIES the motion to withdraw the reference (Dkt. # 1) and directs the clerk to DISMISS this action.

DATED this 2nd day of July, 2010.

/s/ Richard A. Jones

The Honorable Richard A. Jones
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

BKRPTCY NO. 06-11721

PETER ARKISON, in his capacity as Chapter 7 trustee,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., et al.,
Defendants.

CASE NO. C10-171RAJ

ADVERSARY NO. 08-1132TTG

ORDER

This matter comes before the court on a motion to withdraw the reference. Dkt. # 1. So far as it appears, the motion was created when the Bankruptcy Court entered an order on December 30, 2009, directing that trial in this matter be referred to a United States District Court Judge.

The court requested a joint status report from the parties. That report indicates that this case is far from ready for trial, and indeed may never go to trial. Among other things, the parties wish to have additional time to complete discovery, to file dispositive motions

in the bankruptcy court, and to attend a settlement conference before a bankruptcy judge. This process will take at least three months, in the parties' view.

The court accordingly directs the clerk to RE-NOTE the motion to withdraw the reference (Dkt. # 1) for June 15, 2010. On that date, the parties shall file another joint status report indicating what progress they have made in readying this case for trial, including proposing a trial date if appropriate. To the extent that events in the Bankruptcy Court obviate the need for trial, or otherwise impact the motion to withdraw the reference, the parties shall inform the court as soon as possible thereafter.

DATED this 26th day of March, 2010.

/s/ Richard A. Jones

The Honorable Richard A. Jones
United States District Judge

APPENDIX H

28 U.S.C. 157

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a

proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on

its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

APPENDIX I

28 U.S.C. 158

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a

report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate pan-

el comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

Bankruptcy No. 06-11721

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, Et Al.,
Defendants.

Case No. C10-171RAJ

JOINT STATUS REPORT

Peter Arkison, the Chapter 7 Trustee in the above-referenced case and plaintiff in the above-captioned adversary proceeding, through his undersigned counsel, Marjorie Ewing and A.R.I.S., Inc., through their undersigned counsel, Peter Pearce, through his undersigned counsel and E.B.I.A., through its undersigned counsel submits this Joint Status Report pursuant to this Court's Minute Order dated February 25, 2010. Mr. Palaveda, representing himself, was advised via email as to the status conference and did not opt to attend, so this report does not contain any information regarding the position of Mr. Palaveda.

STATUS REPORT

1). Summary of the Pleadings in Bankruptcy Court

The plaintiff filed a motion for summary judgment against ARIS which was denied. The Judge specifically told the parties what other information he needed before he could grant either party summary judgment. It is probable that one party will file another summary judgment motion before the Bankruptcy Court prior to trial in this matter.

The Trustee has prepared a motion for summary judgment against E.B.I.A. which will be noted on the Bankruptcy Judge's April 14, 2010 calendar.

The Trustee has prepared a motion for summary judgment against Peter Pearce which he intended to note for hearing on the April 14, 2010 calendar. However, it appears that Mr. Pearce may be judgment proof and he is currently unemployed. Accordingly, Pearce's counsel is preparing a financial declaration for the Trustee evidencing the fact he is judgment proof. If, after reviewing the declaration and supporting documentation, the Trustee believes Mr. Pearce is judgment proof he will dismiss Mr. Pearce from this adversary proceeding.

No summary judgment has been filed against Mr. Palaveda or Ms. Ewing as of yet but the Trustee anticipates doing so in the near future.

2). Statement of what Pretrial Proceedings are Necessary in District Court

It appears that discovery is substantially completed. The parties would probably need two more months in order to complete any discovery.

The parties believe it would be beneficial to attend a settlement conference before one of the Bankruptcy Judges who is willing to serve as the settlement judge. The Bankruptcy Judges are very busy due to the economy. According to one of the Bankruptcy Judge's secretary, settlement conferences are being set about three months out. Thus, the parties would like to have that much time to convene a settlement conference. If the issues still remain the parties would like a schedule as follows:

Discovery Deadline - Two months after the conclusion of the settlement conference.

Dispositive Motion Deadline - Three months after the conclusion of the Discovery Deadline.

Preliminary Pretrial Statements - One month after the Dispositive Motion Deadline.

Pretrail Statement - One month after Dispositive Motion Deadline.

Trial Date - As set by the Court.

Dated this 12th day of March, 2010.

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Chapter 7 Trustee
Peter Arkison

SHAFER & BAILEY,

See attached signature
Donald Bailey,
WSBA#12289
Attorney for A.R.I.S.

JEFFREY TEICHERT

**
Jeffrey Teichert,
WSBA#29826
Attorney for E.B.I.A.

JAMES STURDEVANT

James Sturdevant per email authority
James Sturdevant,
WSBA#8016
Attorney for Peter Pearce

**

Mr Teichert has not responded at all to the proposed Status Report.

APPENDIX K

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

Bankruptcy No. 06-11721

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, and A.R.I.S.

and

NICHOLAS PALAVEDA and MARJORIE EWING,

and

PETER PEARCE and JANE DOE PEARCE,

Defendants.

Adversary No. 08-1132

MEMORANDUM IN SUPPORT OF MOTION TO VACATE TRIAL DATE

BACKGROUND

Executive Benefits Design Group ("EBDG") is a defendant in the case of Hess v. Executive Benefits Insurance Agency, originally filed in the Superior Court for the State of Washington for Whatcom County as Case No. 06-2-00622-1. Said lawsuit alleged fraudulent conveyances and successor liability to the defendants, and was filed in an attempt to pierce the corporate veil to collect from EBDG and others an arbitration award obtained against the debtor in Whatcom County Case No. 03-2-02515-8 in the amount of $104,214.42. Because any fraudulently conveyed property of the debtor was properly an asset of the bankruptcy estate, counsel for EBDG and the other defendants filed notice of removal of the fraudulent conveyance action to this court on June 30, 2006. On August 2, 2008, EBDG timely filed an answer and a jury demand.[1] On November 20, 2009, this case was set for trial on January 4, 2010.

---

[1] These documents appear at Docket No. 169 and 171 in Case No. 06-11721-TTG, but undersigned counsel appears not to have utilized the Adversary No. 08-1132, when submitting these documents. This is so because, at that time, said counsel was not accustomed to using the ECF filing system in bankruptcy cases. This possible error was not prejudicial to any party in the case. The Answer and Jury Demand were delivered to the Trustee and all other relevant parties via the ECF system at the time. The jury demand was also discussed with this Court and all relevant parties at the pretrial conference. The Court stated at that time that when the case was prepared for trial it would be referred to the U.S. District Court for the Western District of Washington for a jury trial.

DISCUSSION

The United States Supreme Court is unequivocal in holding that preferential transfer actions are actions at law and, thus, the parties to said actions are entitled to jury trials under the Seventh Amendment to the United States Constitution. Granfinanciera v. Nordberg, 492 U.S. 33, 43-49 (1989).

> The question presented is whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer. We hold that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. § 157(b)(2)(H) (1982 ed. Supp. V).

Id. at 37. The United States Court of Appeals for the Ninth Circuit further clarified that, while a bankruptcy court lacks jurisdiction to try a preferential transfer case where there is a jury demand, it retains jurisdiction over pretrial proceedings. Sigma Micro Corp. v. Healthcentral.com, 504 F.3d 775, 786-788 (9th Cir. 2007) ("A valid right to a Seventh Amendment jury trial in the district court does not mean the bankruptcy court must instantly give up jurisdiction and that the action must be transferred to the district court. Instead, we hold, the bankruptcy court may retain jurisdiction over the action for pre-trial matters"). When the pretrial phase of this matter is complete, this Court's jurisdic-

tion over the case is at an end. Thus, the trial date should be stricken and the case transferred to the U.S. District Court for the Western District of Washington for a jury trial. This was discussed in the Judge's Chambers at the pre-trial phase of these proceedings.

DATED this 21st day of December 2009.

TEICHERT LAW OFFICE, PC
/s/ Jeffrey B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Executive Benefits Insurance Agency

APPENDIX L

JUDGE THOMAS GLOVER
CHAPTER 7

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:
BELLINGHAM INSURANCE AGENCY,
Debtor.

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY,
A Washington Corporation,

and

A.R.I.S. Inc., A Washington Corporation,

and

NICHOLAS PALAVEDA and MARJORIE EWING, husband and wife and the marital community composed thereof,

and

PETER PEARCE and JANE DOE PEARCE husband & wife, and the marital community composed thereof,
Defendants.

Bankruptcy No. 06-11721

ANSWER OF DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY

ANSWER

Defendant, Executive Benefits Insurance Agency ("Defendant"), by and through its attorney, Jeffrey B. Teichert of the law firm of Teichert Law Office, PC, and answer the Complaint in this matter as follows:

* * *

JURY DEMAND

26.1 Defendant elects to have the above-entitled cause of action tried before a jury on all issues upon which it is entitled to a jury. Defendant does not consent to have said jury trial in this Court or any other bankruptcy panel.

DATED the 1st day of August 2008.

TEICHERT LAW OFFICE, PC
/s/ Jeffry B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Defendant

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 20 2013
OFFICE OF THE CLERK

No. 12–1200

In The
Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the procedure in 28 U.S.C. § 157(c)(2), which allows parties to consent to the resolution of fraudulent transfer actions before non-Article III bankruptcy judges, constitutional, and if so, did the courts below properly infer petitioner's consent to such resolution in this case?

2. In circumstances where a bankruptcy proceeding's statutory designation as "core" is found to violate Article III of the United States Constitution, may the bankruptcy judge treat the matter as "non-core" and enter proposed findings of fact and conclusions of law for de novo district judge reconsideration under 28 U.S.C. § 157(c)(1)?

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

REASONS FOR DENYING THE PETITION.....6

I. THE CONSTITUTIONALITY OF LITIGANT CONSENT TO NON-ARTICLE III ADJUDICATION IS IRRELEVANT IN THIS CASE GIVEN THE DE NOVO ENTRY OF JUDGMENT BY AN ARTICLE III DISTRICT COURT, MAKING THIS CASE A POOR VEHICLE TO REVIEW THE CONSTITUTIONAL QUESTION. 8

II. THE *WALDMAN* OPINION CREATING THE CIRCUIT SPLIT IS SO ABERRATIONAL THAT FEW COURTS (IF ANY) WILL FOLLOW IT; THIS COURT'S INVOLVEMENT IS NOT REQUIRED. 12

A. *Waldman*'s Prohibition of Litigant Consent to Bankruptcy Court Final Judgment Is Cursory 12

B. *Waldman*'s Prohibition of Litigant Consent to Bankruptcy Court Final Judgment Is Wrong 16

1. *Stern* Explicitly Mentions Section 157(c)(2) in an Opinion Expressly Devoted to the Article III Concerns of the Bankruptcy Court System.....16

2. *Roell v. Withrow* Unambiguously Countenances Litigant Consent to Final Judgments by Magistrate Judges in "Any and All [Civil] Proceedings" Under 28 U.S.C. § 636(c).....19

III. IMPLIED CONSENT WAS CORRECTLY FOUND ON THE FACTS OF THIS CASE. 20

A. Implied Consent Is Permissible. 21

B. The Court Below Was Right on the Fact-Specific Question of Implied Consent 24

C. Issues of Implied Consent to *Stern* Objections Are Time-Limited Ones of Minimal Importance. 26

IV. AS ALL COURTS AGREE, BANKRUPTCY JUDGES CAN TREAT *STERN* CLAIMS AS NON-CORE 27

A. Petitioner Misunderstands *Ortiz* 27

B. No Confusion Reigns in the Lower Courts ...29

C. Petitioner's Other Claims Are Meritless 32

CONCLUSION.....32

TABLE OF AUTHORITIES

Case **Page**

Bank of Neb. v. Rose (In re Rose), 483 B.R. 540, (B.A.P. 8th Cir. 2012) 15

Capron v. Van Noorden, 6 U.S. 126 (1804) 17

Clinton v. City of New York, 524 U.S. 417 (1998) ... 31

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 13,14, 21 19

Duck v. Munn (In re Mankin), 823 F.2d 1296 (9th Cir. 1987), ... 25

Estate of Conners v. O'Conner, 6 F.3d 656, 659 (9th Cir. 1993) 9, 10

Exec. Sounding Bd. Assocs. v. Advanced Mach. & Eng. Co. (In re Oldco M Corp.), 484 B.R. 598, 612–14 (Bankr. S.D.N.Y. 2012) 15

FTI Consulting, Inc. v. Merit Mgmt. Grp., LP, 476 B.R. 535, 539 (N.D. Ill. 2012); 30

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012) (en banc) 15

Gecker v. Flynn (In re Emerald Casino, Inc.), 467 B.R. 128, (N.D. Ill. 2012); 30

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 1, 2, 24, 25

KHI Liquidation Trust v. Wisenbaker Builder Servs. (In re Kimball Hill, Inc.), 480 B.R. 894 (Bankr. N.D. Ill. 2012). 30

Mukamel v. ABN AMRO Fund Servs. Bank (Cayman) Ltd. (In re Palm Beach Fin. Partners), No. 13-80102-CIV, 2013 WL 2036161, (S.D. Fla. May 14, 2013) 16

Nguyen v. United States, 539 U.S. 69 (2003) 22

TABLE OF AUTHORITIES – Continued

Cases **Page**

Ortiz v. Aurora Healthcare, Inc. (In re Ortiz), 665 F.3d 906 (7th Cir. 2011). 5, 27, 28, 29, 30

Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 725 F.2d 537, (9th Cir. 1984) (en banc) 23

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 231 (1995) 19

Pulaski v. Dakota Fin., Inc. (In re Pulaski), 475 B.R. 681 (Bankr. W.D. Wis. 2012) 30

Res. Funding, Inc. v. Pac. Cont'l Bank (In re Wash. Coast I, L.L.C.), 485 B.R. 393, (B.A.P. 9th Cir. 2012) 15

Roell v. Withrow, 538 U.S. 580 (2003).....7, 13, 14, 19, 20, 21, 22, 32

Samson v. Blixseth (In re Blixseth), No. 09-60452-7, 2011 WL 3274042 30

Samson v. Western Capital Partners LLC (In re Blixseth), No. 09-60452-7, 2011 WL 6217416, (Bankr. D. Mont. Dec. 14, 2011) 30

Schafer v. Nextiraone Fed., LLC, No. 1:12CV289, 2012 WL 2281828 (M.D.N.C. June 18, 2012 30

Sheridan v. Michels (In re Sheridan), 362 F.3d 96 (1st Cir. 2004) 17, 21

Stern v. Marshall, 131 S. Ct. 2594 (2011).... 3, 4, 5, 12, 16, 20, 24, 25, 26, 27, 28, 29, 31

United States v. Will, 449 U.S. 200, 218 (1980).....15

Waldman v. Stone, 698 F.3d 910 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1604 (2013) 5, 12, 13, 14, 15, 16

TABLE OF AUTHORITIES – Continued

Statutes

28 U.S.C. §157(b) 3, 18
28 U.S.C. § 157(c) 4, 7, 12, 16, 17, 18, 23
28 U.S.C. § 158(a) 28
28 U.S.C. § 636(c). 19, 20, 21, 22, 23, 28
28 U.S.C. § 1334(b) 23
478 U.S. 833, 848 (1986) 13

Other Authorities

130 Cong. Rec. 6045 (1984) 23
Black's Law Dictionary (9th ed. 2009) 32
E. Warren & J. L. Westbrook, *The Success of Chapter 11*, 107 Mich. L. Rev. 603 (2009). 27

RESPONDENT'S BRIEF IN OPPOSITION

Peter Arkison, trustee of the Estate of Bellingham Insurance Agency, Inc., respectfully opposes the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

This petition arises out of the bankruptcy of Bellingham Insurance Agency, Inc. ("Bellingham"). The trustee in that chapter 7 bankruptcy case, Peter Arkison, is the respondent to this petition. As part of his investigation into the affairs of Bellingham, Arkison concluded that Executive Benefits Insurance Agency ("EBIA"), petitioner here, received a massive transfer of the debtor's funds on the eve of bankruptcy and indeed was a mere successor entity/alter-ego of the debtor – all part of a scheme orchestrated by one of the debtor's principals and EBIA's former counsel. Arkison brought suit against petitioner and related defendants (including the principal) in bankruptcy court, alleging against EBIA claims for fraudulent transfer and alter-ego liability.

EBIA answered the complaint and (belatedly) demanded a jury trial, invoking its rights under *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). See Pet. App. 29a. The district court below treated this jury trial demand as a motion to withdraw the reference from the bankruptcy court and docketed it as such. *Ibid.* In a Joint Status

Report to the district court, however, EBIA subsequently asked to stay consideration of the motion to withdraw the reference to allow further proceedings to unfold in bankruptcy court, which the district court permitted. *Id.* at 29a, 62a–63a.

As the court below explained, EBIA knew it was consenting to possible bankruptcy court resolution of its claims on summary judgment when abandoning its attempt to have its case heard in the Article III district court in favor of bankruptcy court (perhaps encouraged by one defendant's success in defeating a summary judgment motion there, see *id.* at 74a): "In other words, [petitioner] did not simply fail to object to the bankruptcy judge's authority to enter final judgment in the fraudulent conveyance action; it affirmatively assented to suspend its demands for a jury trial in district court to give the bankruptcy judge an opportunity to adjudicate the claim." *Id.* at 29a.

Trustee Arkison was successful in his summary judgment motion in bankruptcy court, and final judgment was entered against EBIA. *Id.* at 53a–54a. EBIA appealed to the district court, which conducted a de novo review and affirmed on all grounds, finding that EBIA had "done nothing to show any defect in the Bankruptcy Court's grant of summary judgment" and, in fact, "everything to hinder the Court in assessing the merits of the appeal." *Id.* at 51a. EBIA further appealed to the Court of Appeals for the Ninth Circuit, which, in the opinion below, affirmed. *Id.* at 39a–40a.

In a motion to dismiss submitted to the Court of Appeals prior to oral argument, EBIA raised for the

first time an objection to bankruptcy court adjudication of the fraudulent transfer and alter-ego liability actions against it, raising its perceived rights to Article III adjudication under *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Pet. App. at 7a–8a. The court below considered and rejected these last-minute claims. *Id.* at 26a–33a.

After oral argument in the case below, the Court of Appeals (Kozinski, C.J., presiding) sua sponte invited amicus curiae participation on two questions: first, "whether bankruptcy courts may enter a final, binding judgment on an action to avoid a fraudulent conveyance"; and second, "whether, if they cannot enter such final judgments, bankruptcy courts may hear the proceeding and submit a report and recommendation to a federal district court." *Id.* at 8a n.3.

In a lengthy and unanimous opinion affirming the district court and wholly rejecting EBIA's claims, the Court of Appeals answered the sua sponte questions. It held that non-Article III bankruptcy judges may not enter final judgments in fraudulent conveyance actions absent party consent, notwithstanding Congress's designation of such actions as "core proceedings" under section 157(b) of Title 28, see 28 U.S.C. § 157(b) (allowing bankruptcy courts to enter final judgments in "core proceedings" irrespective of party consent and including "proceedings to determine, avoid, or recover fraudulent conveyances" in non-exhaustive list of core proceedings), believing this outcome was required by this Court's holding in *Stern*. The court below also held, however, that this (potential) Article III problem was irrelevant, because EBIA

consented to bankruptcy court adjudication through its unambiguous conduct in the lower courts. Pet. App. 39a–40a (citing section 157(c)(2), which permits bankruptcy judges to enter final judgments in non-core proceedings upon district court referral and party consent).[1] (This finding of party consent technically rendered the court below's constitutional answer to the first sua sponte question dictum.)

On the second sua sponte question, the Court of Appeals held that on statutorily designated core claims where Article III prevents a bankruptcy judge from entering final judgment absent party consent ("*Stern* claims," for simplicity), when the parties do not consent, bankruptcy judges may treat the claims as non-core and submit reports and recommendations of proposed findings of fact and conclusions of law to the district court. Pet. App. 24a–25a (citing 28 U.S.C. § 157(c)(1) (permitting district courts to enter final judgments in non-core proceedings after reviewing de novo proposed findings of fact and conclusions of law of bankruptcy judges)). (This second sua sponte question resolution might also be dictum in light of the finding of consent.)

---

[1] Section 157(c) actually does not use the term "non-core," for reasons not relevant to this petition, but instead uses the infamous "related to" language. 28 U.S.C. § 157(c) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11."). This Court held in *Stern v. Marshall* that "related to" means the same thing as non-core. 131 S. Ct. 2594, 2604–05 (2011).

As petitioner, EBIA now seeks this Court's review of two questions, contending that each raises a circuit split. The first is the court below's holding that EBIA can and did waive its Article III objections by consenting through its conduct to bankruptcy court resolution of its fraudulent conveyance action, which it contends creates a circuit split with *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012) (forbidding such consent), *cert. denied*, 133 S. Ct. 1604 (2013). The second is that as a procedural matter bankruptcy courts can treat *Stern* claims as non-core and resolve them accordingly. EBIA contends this dictum pronouncement in the opinion below also creates a circuit split, with *Ortiz v. Aurora Healthcare, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011).

In asking this Court to review the permissibility of litigant consent to non-Article III adjudication of private rights in bankruptcy, petitioner is inescapably challenging the constitutionality of section 157(c)(2), which explicitly permits such consent. Embedded in this request is an alternative entreaty: that if section 157(c)(2) remains constitutional, and hence party consent to bankruptcy court adjudication is permissible, this Court should hear the case-specific factual question whether the court below properly inferred EBIA's consent.

Petitioner's second ground for seeking this Court's review is to address the technical question of what to do with *Stern* claims as a procedural matter – specifically, whether bankruptcy courts should just treat them as non-core notwithstanding their statutory classification as core. Petitioner premises

the need for this Court's review of this more arcane point on a purported circuit conflict between the Courts of Appeals for the Seventh and Ninth Circuits – a conflict that respondent submits does not exist.

REASONS FOR DENYING THE PETITION

This case presents a poor vehicle for review of the circuit split regarding the permissibility of consent to non-Article III adjudication. The court below's judgment can be affirmed on the independent ground that any Article III defect was harmless and moot in light of the de novo consideration of EBIA's claim EBIA received by an Article III U.S. District Court.

Furthermore, any such split is unripe for review and results only from a prior aberrational decision of the Court of Appeals for the Sixth Circuit on which this Court just denied certiorari. Given the immaturity of the split – both opinions are from 2012 – and the complete lack of evidence that any court will follow the Sixth Circuit path, this Court should allow lower courts time to confront the issue before expending resources on what could well prove to be a one-off jurisprudential hiccough.

Indeed, the unusual nature of the Sixth Circuit opinion that conflicts with the case below heightens the likelihood it will not be well followed. In denying litigants the right to consensual resolution of private rights before non-Article III bankruptcy judges, it struck down – without mention or citation

– section 157(c)(2) of Title 28, a mainstay of bankruptcy court structure for decades. The Ninth Circuit opinion below, by contrast, after inviting the views of a dozen amici curiae, discusses section 157(c)(2) and engages in extended analysis of this Court's judgment in *Roell v. Withrow*, 538 U.S. 580 (2003), which is expressly devoted to the near-identical consent-based adjudicatory scheme of magistrate judges. Given that both circuit court opinions are from 2012, whatever conflict that may develop is unripe and may well dissipate.

Petitioner's alternative argument – that even if litigant consent is constitutionally permissible to allow non-Article III adjudication in bankruptcy court, the court below erred in finding that consent through EBIA's unambiguous conduct – seeks a case-specific error correction that would be a poor use of this Court's scarce resources. Indeed, the question of implied litigant consent in bankruptcy cases initiated before this Court's opinion in *Stern* is a time-limited one of minimal importance. Litigants today invoke *Stern* by name, and the pace of bankruptcy litigation is generally so fast that few if any pending cases involve parties who could not have known of *Stern* before their relevant filing deadlines.

Petitioner's second, more technical ground for seeking certiorari, on the ability of bankruptcy courts to treat *Stern* claims as non-core, risks another poor use of this Court's time. No circuit split exists (petitioner's contention to the contrary notwithstanding), and respondent is hard-pressed to find any court that thinks bankruptcy courts are

hamstrung in the way petitioner contends the Seventh Circuit suggests.

I. THE CONSTITUTIONALITY OF LITIGANT CONSENT TO NON-ARTICLE III ADJUDICATION IS IRRELEVANT IN THIS CASE GIVEN THE DE NOVO ENTRY OF JUDGMENT BY AN ARTICLE III DISTRICT COURT, MAKING THIS CASE A POOR VEHICLE TO REVIEW THE CONSTITUTIONAL QUESTION.

Nobody contends that United States District Judge Pechman was unable to enter judgment against EBIA. That is what she did when, on January 21, 2011, she concluded a de novo review of the bankruptcy court's resolution of the case on summary judgment. Petitioner's characterization of the district court review as a "substantial evidence" review is simply false, Pet. 4; the district court reviewed the bankruptcy court's order de novo. Pet. App. 45a ("The Court reviews the Bankruptcy Court's order de novo.").[2]

Assuming, arguendo only, that petitioner is right and the bankruptcy court had no constitutional authority to enter its summary judgment decision as a final judgment, then the outcome would have been for EBIA to present its claim to the District Court for resolution by an Article III judge – which is what happened here on Judge Pechman's de novo review.

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[2] The court offhandedly stated at one point that "[t]here is substantial evidence supporting" one of the bankruptcy court's conclusions. Pet. App. 50a. It would be absurd to suggest that this comment contradicts the court's express declaration it was conducting a de novo review, see *id.* at 45a.

EBIA thus got all the Article III treatment it wanted and to which it was entitled. Petitioner alleges no harm from what was at worst a constitutionally irrelevant first stop in bankruptcy court. No judgment money was paid, no preclusive effect was given to the bankruptcy court's order by other courts, and the bankruptcy court resolution of the summary judgment motion received no deference on appeal. Indeed, if the bankruptcy court had treated EBIA's claim as non-core from the outset – as EBIA presumably would have preferred – and entered merely proposed findings of fact and conclusions of law, then EBIA still would have ended up in the exact same boat: losing in bankruptcy court, getting de novo review by an Article III district court upon timely objection, and then losing again there (and one more time in the Court of Appeals). That is precisely what happened here.

In a strikingly similar case involving another non-Article III judge, *Estate of Conners v. O'Conner*, the Court of Appeals held that a magistrate judge did not have authority to enter a postjudgment order of attorney's fees. 6 F.3d 656, 659 (9th Cir. 1993). The district court, however, caught the error and subjected the flawed order to de novo review, recasting it as proposed findings of fact and conclusions of law, and then entering judgment after that review. Approving this outcome and the functional mootness of the appellant's complaint, the Court of Appeals summarized: "[The] error . . . was cured by the district court's later de novo review of the magistrate's findings and conclusions, and the

court's entry of its own order awarding attorney's fees and costs." *Ibid.*[3]

In the instant case, the district court below did a searching de novo review and found EBIA's arguments utterly meritless, holding EBIA "failed to raise *any* dispute of fact that might preclude the entry of [summary] judgment." Pet. App. 46a (emphasis added). The court further held that in contrast to the trustee's considerable evidence – including the debtor's own accounting records showing transfers out to EBIA – the only evidence submitted by the defendant was a "self-serving" declaration sheepishly proclaiming either ignorance of the transfers or at best a "clerical error." *Id.* at 47a–49a. The district court summed up: "The Bankruptcy Court did not err . . . ." *Id.* at 47a.

Similarly, in the face of overwhelming evidence of actual fraud in the fraudulent transfer claims (including wholesale transfers of the debtor's assets within three days of an adverse arbitration ruling), the district court likewise noted:

> [EBIA] has done nothing to point out where in the record contradictory facts exist. It attempts to argue that EBIA received nothing from [the debtor] and that it was an entirely different business. This is supported only by

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[3] Similar mootness arguments can be made regarding the alter-ego claim, which is not even a matter of private right but of federal bankruptcy law arising directly under the Bankruptcy Code's definition of "debtor" under section 101(13) of Title 11. Affirmance of this claim renders moot any error with the fraudulent transfer claim.

> Defendant Paleveda's self-serving declaration, which, as explained above, fails to raise a genuine issue of material fact.

Id. at 49a. Affirming the district court, the court below accused petitioner of engaging in the Freudian "narcissism of minor differences." *Id.* at 38a & n.12.

The district court concluded its de novo review, finding no "plausible basis for reversal" on the alter-ego claim, *id.* at 51a, and pointing out instances where petitioner's arguments hurt rather than helped its cause. For example, it stated that

> [EBIA] has done nothing to show any defect in the Bankruptcy Court's grant of summary judgment. . . . . On the merits, Appellant has failed to show *any* dispute of material fact in the record that could *possibly* support the reversal of the Bankruptcy Court's order. The Court DISMISSES the appeal and AFFIRMS the Bankruptcy Court.

Ibid. (emphasis added).

In sum, EBIA got all the Article III consideration of its defenses to which it was entitled under the Constitution. Accordingly, even if this Court grants review of the constitutional question presented in the petition, the outcome of the case will not change. Either the court below was correct on the constitutional question, resulting in affirmance, or the court below was incorrect on the constitutional question, and petitioner was entitled to Article III adjudication of his fraudulent conveyance defense – but since he already received that Article III

consideration in district court, affirmance would once again result. This case thus presents a poor vehicle to review the constitutional question presented.

II. THE *WALDMAN* OPINION CREATING THE CIRCUIT SPLIT IS SO ABERRATIONAL THAT FEW COURTS (IF ANY) WILL FOLLOW IT; THIS COURT'S INVOLVEMENT IS NOT REQUIRED.

The court below held that EBIA can – and did – consent to adjudication of its claims by a non-Article III judge. EBIA seeks review of that holding, citing a circuit split with *Waldman*, in which the Court of Appeals for the Sixth Circuit held that such consent is constitutionally impermissible. But that holding would require invalidating section 157(c)(2) of Title 28 – a provision of the U.S. Code the *Waldman* court did not even consider, but one which this Court in *Stern* itself cited repeatedly. Respondent thus concedes the split's existence but respectfully submits that it is trivial. Few courts, if any, are likely to follow *Waldman*'s cursory constitutional analysis. More importantly, given that both *Waldman* and the case below were decided in 2012, this Court should wait to see whether this incipient circuit split ever ripens to maturity.

A. *Waldman*'s Prohibition of Litigant Consent to Bankruptcy Court Final Judgment Is Cursory.

In *Waldman*, 698 F.3d at 917, the Court of Appeals for the Sixth Circuit quotes the language in

Commodity Futures Trading Commission v. Schor that there is a structural (and hence unwaiveable) component to the Article III right as well as a personal (and hence waiveable) component: "Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." 478 U.S. 833, 848 (1986) (citations and internal quotation marks omitted).[4]

When the United States as Amicus Curiae noted the difference between the personal and the structural nature of the Article III right and that the

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[4] Justice Brennan's more formalistic rule that Article III is entirely structural and never waiveable was thus categorically rejected in *Schor*. See 478 U.S. at 867 (Brennan, J., dissenting) ("I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required."). The Commodity Futures Trading Commission as well as the magistrate and bankruptcy court systems have all functioned well for decades since then, and the Article III judiciary appears to have suffered no concomitant diminution of power and respect, perhaps showing with the benefit of hindsight that Justice Brennan's concerns were overstated and that this Court's constitutional comfort was apt. "From a realistic and practical perspective, reference of civil cases to magistrates with the consent of the parties, subject to careful supervision by Article III judges, may serve to strengthen an independent judiciary, not undermine it." *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir. 1984) (en banc) (Kennedy, J.); cf. *Roell v. Withrow*, 538 U.S. 580, 589 n.6 (2003) (discussing the 1990 amendments to 28 U.S.C. § 636(c) that evinced increasing comfort with the magistrate judge system and "diminishing concern that communication between the judge and the parties would lead to coercive referrals").

structural one is only implicated when other branches of the government encroach upon the judiciary, the Court of Appeals disagreed: "The argument takes too narrow a view of the interests preserved by Article III. The issue here is not so much aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one." *Waldman*, 698 F.3d at 918.

The *Waldman* court did not expand on this distinction, leaving unexplained just where power taken from the judicial branch would be going if not to another branch. In fact, in contrast to the Ninth Circuit's sua sponte amicus call that spawned a voluminous opinion, the Sixth Circuit's entire discussion of this constitutional issue spans barely a page. See *id.* at 917–18. *Waldman* contains a cite to *Schor* and to *Stern* but to nothing else: there is no mention of section 157(c)(2), let alone *Roell*, which is this Court's most recent pronouncement on litigant consent to non-Article III adjudication (discussed *infra*). *Waldman* has just a cursory proclamation that Article III concerns are simply "unwaiveable" – apparently ever – by parties who seek to try cases before non-Article III jurists, such as magistrate or bankruptcy judges. *Ibid.*[5]

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[5] The Sixth Circuit elided *Schor*'s more detailed pronouncement that the structural aspect of Article III is the exceptional residuum and that the main right is personal and waiveable: "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal, rather than structural, interests." *Schor*, 478 U.S. at 848. This makes sense if one believes that judicial independence is not an end unto itself but a means of

In light of the repeated reference by this Court to the ability of parties to try private rights consensually before magistrate and bankruptcy judges, it is difficult to imagine *Waldman* generating serious following, let alone confusion, in the federal courts. A case that strikes down a longstanding provision of the Judicial Code without even mentioning it, let alone the Supreme Court's recent citations to it, bespeaks inadvertence. Indeed, in its short lifespan, *Waldman* has already attracted the express disagreement of courts in three jurisdictions, see *Bank of Neb. v. Rose (In re Rose)*, 483 B.R. 540, 544–45 (B.A.P. 8th Cir. 2012); *Res. Funding, Inc. v. Pac. Cont'l Bank (In re Wash. Coast I, L.L.C.)*, 485 B.R. 393, 407–08 (B.A.P. 9th Cir. 2012); *Exec. Sounding Bd. Assocs. v. Advanced Mach. & Eng. Co. (In re Oldco M Corp.)*, 484 B.R. 598, 612–14 (Bankr. S.D.N.Y. 2012), and the Sixth Circuit itself is not averse to using its own en banc procedures to reverse decisions, see, e.g., *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) (en banc). By contrast, no court appears to have disagreed so far with the court below's holding that the right to an Article III judge is waiveable in bankruptcy.[6]

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ensuring impartial resolution of rights held by individuals in these United States. See *ibid.* (explaining Article III protects an individual's "right to have claims decided before judges who are free from potential domination by other branches of government" (quoting *United States v. Will*, 449 U.S. 200, 218 (1980))).

[6] At least one court has quibbled with the court below's holding that bankruptcy judges cannot finally decide fraudulent conveyance actions. See *Mukamel v. ABN AMRO Fund Servs. Bank (Cayman) Ltd. (In re Palm Beach Fin.*

Accordingly, EBIA's insistence that this Court must grant its petition to resolve the circuit-splitting question on the permissibility of private litigant consensual adjudication in non-Article III systems like the bankruptcy and magistrate courts is at best premature and at worst exaggerated.

B. *Waldman*'s Prohibition of Litigant Consent to Bankruptcy Court Final Judgment Is Wrong.

The court below held that litigant consent to non-Article III adjudication by bankruptcy courts raises no Article III concerns. *Waldman*'s contrary holding supported by petitioner, while creating a circuit split, is so clearly wrong that few courts, if any, will be led astray.[7]

Section 157(c)(2)'s allowance of party consent to non-Article III bankruptcy court adjudication is clearly constitutional, and no intervention is required to reaffirm that. This Court has recently cited this statutory provision specifically and more generally approved litigant consent to non-Article III magistrate judge adjudication.

Partners), No. 13-80102-CIV, 2013 WL 2036161, at *3–4 (S.D. Fla. May 14, 2013). That holding is not at issue here, and respondent is not cross-petitioning on it.

[7] Respondent would not, of course, object to this Court granting the petition solely to enter a summary affirmance.

1. *Stern* Explicitly Mentions Section 157(c)(2) in an Opinion Expressly Devoted to the Article III Concerns of the Bankruptcy Court System.

While subject matter jurisdiction cannot be conferred by consent, *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804), entitlement to an Article III jurist is a different matter. As the First Circuit explains:

> Unlike the issue of subject matter jurisdiction, which may neither be waived nor forfeited by the parties, and into which the courts are duty-bound to inquire, *sua sponte*, even absent objection by any party, the protections afforded by the *Northern Pipeline* core/non-core distinction may be waived or forfeited, either by (i) consenting to the bankruptcy court's treatment of an otherwise non-core proceeding as core, or (ii) failing to raise or pursue the issue adequately on appeal.

Sheridan v. Michels (In re Sheridan), 362 F.3d 96, 100 (1st Cir. 2004) (citations omitted).

As this Court itself added in *Stern*:

> Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. *See § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case).*

131 S. Ct. at 2607 (emphasis added).

Petitioner's suggestion that consent to non-Article III adjudication of private rights is now impermissible – by command of *Stern*, no less – is impossible to square with this passage from the opinion. See also *id.* at 2606 ("Vickie argues [that] a party may waive or forfeit any objections under § 157(b)(5), in the same way a party can waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim.") (citations omitted, including explicit quotation of section 157(c)(2)). And as this Court further summarized:

> The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as establishing only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review. Just so: Substitute "tort" for "contract," and that statement directly covers this case.

Id. at 2615 (internal quotation marks, citations, and alterations omitted; emphasis added).

Stern provides no support for EBIA's contention that litigant consent is insufficient to permit non-Article III resolution of private rights in bankruptcy and thus section 157(c)(2) violates Article III. On the contrary, *Stern*'s repeated references to section 157(c)(2) without a whiff of constitutional disapprobation renders such an implication difficult

at best and unfounded at worst.[8] *See generally Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases.").

2. *Roell v. Withrow* Unambiguously Countenances Litigant Consent to Final Judgments by Magistrate Judges in "Any and All [Civil] Proceedings" Under 28 U.S.C. § 636(c).

In 2003, this Court decided *Roell v. Withrow*, 538 U.S. 580 (2003), which considered implied consent to federal magistrate judge final judgments in civil proceedings. Under section 636(c) of Title 28, just like section 157(c), parties can consent to a non-Article III magistrate judge's final adjudication of private rights. The majority opinion affirmed that implied consent of the parties was sufficient to grant magistrate judge adjudicative authority notwithstanding the lack of express written consent as commanded by the relevant Federal Rules of Civil Procedure. *Id.* at 582, 586–87 (holding that the statute's textual reference to mere "consent" trumped Rule 73(b)'s reference to an express execution and filing of "a joint form of consent").

The dissent rejected implied consent, preferring for prudential reasons the bright-line rule of express consent to escape what it feared would be a

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[8] *Commodity Futures Trading Commission v. Schor* also involved the waiver of Article III protections regarding a claim grounded in a private right. 478 U.S. 833, 848–50 (1986).

litigation-inducing standard. *Id.* at 596 (Thomas, J., dissenting) ("If express consent is required, courts will not have to study the record of a proceeding on a case-by-case basis, searching for patterns in the parties' behavior that would provide sufficient indicia of voluntariness to satisfy this newly minted, but vague, test for consent."). But even the dissent recognized the Article III permissibility of party consent to magistrate court disposition by final judgment: "Reading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also ensures that the parties knowingly and voluntarily waive their right to an Article III judge." *Id.* at 595. Again, it is difficult to suggest the Court deciding *Roell* somehow thought party consent to magistrate judge resolution of private rights would violate Article III.[9]

III. IMPLIED CONSENT WAS CORRECTLY FOUND ON THE FACTS OF THIS CASE.

EBIA argues strenuously in the alternative that even if consent is permissible to justify non-Article III adjudication of private rights in bankruptcy court, that consent should not have been implied in this case. This case-specific request for error correction is not compelling and, indeed, ill-taken given the unambiguous evidence of consent documented by the court below.

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[9] Petitioner does not suggest *Stern* overruled *Roell*, which is unsurprising – *Stern* does not even cite *Roell*.

A. Implied Consent Is Permissible.

Consensual resolution does not offend Article III, and *Roell* holds that that consent may be implied.[10] (For an interesting discussion of whether this should properly be called "implied consent" or "waiver," see *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 113 n.20 (1st Cir. 2004) (Lynch, J., dissenting) (discussing bankruptcy practice of considering Article III waiver as question of implied consent, collecting cases (including *Schor*), and concluding that "[t]he terms are used interchangeably . . . as the substantive standard is the same").) Petitioner tries to hide from this unequivocal holding of *Roell* approving implied consent by dropping a footnote to make the following contention: "In *Roell*, . . . the *only question* at issue was the statutory one: whether consent implied through conduct can count as conferring civil jurisdiction under 28 U.S.C. § 636(c)(1). [*Roell* does not] constitute[] controlling precedent on the Article III questions presented by this petition." Pet. 17 n.1 (citations, alterations, and quotation marks omitted). This argument is unpersuasive – and ironic. On the next page of its petition, EBIA quotes Justice Thomas's Article III concerns addressed in *Roell*. *Id.* at 18. To suggest this Court addressed seriously the statutory issue of whether and when to infer consent under section 636(c)(1) in *Roell* but at the same time overlooked

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[10] Petitioner does not ask to overrule *Roell*.

the fact that section 636(c)(1) is entirely unconstitutional boggles the mind.[11]

Petitioner tries to distinguish section 636 from section 157 by noting Congress requires more explicit protection of consent under the former. "Unlike the Federal Magistrate Act of 1979 considered in *Roell*, the Bankruptcy Code does not ensure that litigants in core proceedings are advised of their Article III rights." Pet. 19. Its implication is that the Judicial Code is right on the constitutional margin, with magistrate judges making the Article III cut but bankruptcy judges not – wholly on account of this heightened consent protection.

This argument is inapposite. First, the magistrate provisions were enacted against an explicit congressional backdrop of fear of "coerced" consent into magistrate courts, encouraged by overwhelmed federal judges seeking to push litigants away, perhaps especially the disadvantaged. *Roell*, 538 U.S. at 589 ("It was . . . concern about the possibility of coercive referrals that prompted Congress to make it clear that the voluntary consent of the parties is required before a civil action may be referred to a magistrate for a

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[11] By contrast, an example of this Court's express exclusion of a constitutional argument would be its admonition in *Nguyen v. United States* that because it invalidated the appellate panel containing a non-Article III judge on statutory grounds alone it need not address the additional constitutional grounds under Article III that might also have required invalidation. 539 U.S. 69, 76 n.9 (2003) ("We find it unnecessary to discuss the constitutional questions because the statutory violation is clear."). If a law is invalidated statutorily, it need not be "double-invalidated" constitutionally.

final decision.") (internal quotation marks omitted); see also *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 553–55 (9th Cir. 1984) (en banc) (Kennedy, J.) (discussing legislative history and context of Magistrate Act). But coercion was not a principal concern motivating the enactment of the bankruptcy referral scheme. See 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier) (discussing consent without reference to risk of coercion).

Secondly, and more importantly, the wide swath of adjudicatory authority conferred on magistrate judges dwarfs the more narrow sphere in which bankruptcy judges operate. Bankruptcy judges may only finally decide private rights "related to" a debtor's bankruptcy proceeding, 28 U.S.C. § 1334(b), and even then only upon parties' consent, *id.* § 157(c). Magistrate judges, by contrast, can decide "any or all proceedings in a jury or nonjury civil matter." *Id.* § 636(c)(1). To the extent that a distinction between the magistrate judges and bankruptcy judges is appropriate, presumably Congress would have wanted *additional* safeguards on the exercise of judicial power by the wider-ambit magistrate judges. Accordingly, even assuming the heightened consent protection of litigants invoking magistrate judge resolutions is relevant, it is perfectly understandable given a magistrate judge's broader judicial reach into the private right domain – with literally *any* civil action eligible for consideration.[12]

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[12] Most of the bankruptcy court docket involves the routine processing of claims and objections – straight-up core

B. The Court Below Was Right on the Fact-Specific Question of Implied Consent

The court below held that EBIA consented to bankruptcy judge resolution by affirmatively requesting to stay the withdrawal of the reference motion pending in district court so that matters could proceed in bankruptcy court (in retrospect a decision petitioner doubtless regrets given its loss there). Pet. App. 28a–30a. This tactical decision was made in 2010 when the Court of Appeals handed down its own opinion in *Stern*, which this Court functionally affirmed on different grounds.[13]

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proceedings. Fraudulent conveyance actions against non-creditor defendants are infrequent. Indeed, it is no surprise that the major precedents of this Court (*Granfinanciera*, *Northern Pipeline*, even *Stern*) all involve corporate or at least well heeled litigants unlikely to be ignorant of their legal rights – the worry that animated the Congress drafting the magistrate judge consent provisions. See *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (U.S. 2011) (involving claims against the estate of "a man believed to have been one of the richest people in Texas"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36–37 (1989) (involving a corporation controlled by the government of Colombia); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56–57 (1982) (plurality opinion) (involving litigation between two oil-pipeline companies).

[13] While the Court of Appeals' *Stern* decision actually came down a few days after (March 19) the parties requested that pretrial proceedings continue in the bankruptcy court (March 15), the status report lay pending with the district court for ample time after *Stern* to enable amendment before the court entered its order (March 26). And of course, the *Stern* opinion itself was under reserve for quite some time before that. After the bankruptcy court's summary judgment order, EBIA never revived the reference withdrawal motion, causing it ultimately to be dismissed as abandoned. Pet. App. 60a–61a.

The Court of Appeals' *Stern* decision already made clear that section 157's inclusion of private rights as core proceedings raised serious constitutional problems under Article III. Indeed, Pierce Marshall himself, the petitioner in *Stern*, strenuously objected to the Article III problems before the Court of Appeals and other courts, mindful of the court below's then-precedents and well before this Court decided his case. *Stern v. Marshall*, 131 S. Ct. 2594, 2607–08 (2011) (noting that although Pierce was late in objecting to bankruptcy court adjudication of *his defamation claim*, he had been making the same Article III objection with respect to *Vickie's counterclaim* all along).

Petitioner makes much of the fact that an old Ninth Circuit case predating *Granfinanciera* purportedly negated any Article III claim he might have, see Pet. 3–4, 23–25 (citing *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987), *overruled by Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553 (9th Cir. 2012)), but that case's ongoing vitality was in serious doubt after *Granfinanciera* if not already overruled by it. The court below called petitioner out: "Although EBIA may not be as sophisticated or creative as Pierce, it fully litigated the fraudulent conveyance action before the bankruptcy court and district court, without so much as a peep about Article III – even going so far as to abandon its motion to withdraw the reference. . . . Having lost before the bankruptcy court, EBIA cannot assert a right it never thought to pursue when it believed it

might win." Pet. App. 33a. Nor can it be said EBIA was shy or unaware of its constitutional rights; it demanded and stuck to its Seventh Amendment jury trial rights at first before later abandoning the reference withdrawal request. *Id.* at 28a–30a. Accordingly, this Court's intervention is not required to revisit the factual question whether the Court of Appeals correctly concluded that petitioner's unambiguous conduct constituted consent to bankruptcy court adjudication and waiver of whatever Article III rights it may have had.[14]

C. Issues of Implied Consent to *Stern* Objections Are Time-Limited Ones of Minimal Importance.

An independent reason rendering this case a poor use of the Court's limited resources is the necessarily time-limited nature of the problem of inferring consent to bankruptcy court adjudication in the face of a possible *Stern* objection. Petitioner makes great hay of the fact it did not and could not know of its *Stern* rights until *Stern* itself was decided. Whatever petitioner's alleged state of knowledge was, everyone in the bankruptcy world now has had two years of living with *Stern*. That is an eternity in the bankruptcy context; most

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[14] Were this Court inclined to intervene and review that factual determination, it would surely affirm the court below on whatever standard of review it might choose to employ for an issue of implied consent. Cf. *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 103 n.5 (1st Cir. 2004) (presenting different approaches bankruptcy courts have deployed to determine when consent to bankruptcy court adjudication can fairly be implied by litigant conduct).

bankruptcy petitions are resolved in under a year.[15] The problem of what facts suffice to find an implied consent to bankruptcy court adjudication in the absence of an express invocation of *Stern* was a small one to start with and gets smaller each day. Once again, this Court need not get involved on a question of such limited importance.

IV. As All courts Agree, Bankruptcy Judges Can Treat *Stern* Claims as Non-core.

Seizing upon a purported circuit conflict, petitioner's second ground for seeking certiorari is that this Court is required to clean up confusion over just how bankruptcy courts can resolve *Stern* claims. Petitioner is mistaken. There is no circuit conflict on this unremarkable issue.

A. Petitioner Misunderstands *Ortiz*.

Petitioner builds its second ground for certiorari on *Ortiz v. Aurora Healthcare, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011), in which the Court of Appeals for the Seventh Circuit dismissed a case for lack of appellate jurisdiction in which the bankruptcy court issued a final judgment on a *Stern* claim.[16] Because circuit courts can for the most part

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[15] One study shows that the median length of chapter 11 bankruptcies is eleven months. Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11*, 107 Mich. L. Rev. 603, 626 (2009). The median duration of chapter 7 bankruptcies, which are simpler proceedings that constitute the lion's share of the bankruptcy docket, is far shorter.

[16] The *Ortiz* case is odd. It involves a debtor's purported state law cause of action for revealing confidential medical information arising from a medical creditor's (required)

only review final judgments, see 28 U.S.C. § 158(a), and because its case was directly certified by the bankruptcy court for immediate appeal under section 158(d)(2), the Court of Appeals held that the lack of a valid underlying final judgment on the *Stern* claim by the bankruptcy court rendered it without appellate jurisdiction. *Ortiz*, 665 F.3d at 915. It remanded the case to the bankruptcy court for further proceedings, see *ibid.* – the very disposition that petitioner suggests *Ortiz* forbids.

That is exactly what the Court of Appeals for the Ninth Circuit said to do with *Stern* claims in the case below. There is thus no circuit split but a circuit alignment. Neither circuit would prevent a district court, which can either hear de novo reconsiderations of proposals under section 157(c)(1) or appeals of final judgments under section 158(a)(1), from recharacterizing a disposition misclassified as the latter as arising under the former. Indeed, that is what happened in the district court in *Stern* itself – which this Court recounted without any disapproval – when the lower court treated the bankruptcy court's final judgment on Pierce's counterclaim as a proposed finding of fact and conclusion of law. 131 S. Ct. 2594, 2602 (U.S. 2011). Thus, to be perfectly clear, *Ortiz* was a case about appellate jurisdiction, which has nothing to do with the issues in this case. Finding no valid

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bankruptcy proof of claim filing, but the opinion contains no pre-emption analysis of that state law by federal bankruptcy law.

final judgment below, the *Ortiz* panel dismissed the appeal. Petitioner errs in alleging a circuit split.[17]

B. No Confusion Reigns in the Lower Courts.

Aside from some stray comments of dictum, respondent is unable to unearth any case holding that bankruptcy courts cannot simply treat *Stern* claims as non-core and enter proposed findings of

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[17] The *Ortiz* court made a stray comment wholly unnecessary to its decision that petitioner seizes upon:

> For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under [section] 157(c)(1), we would have to hold that the debtors' complaints were not a core proceeding but are otherwise related to a case under title 11. As we have just concluded, the debtor's claims qualify as core proceedings and therefore do not fit under § 157(c)(1).

Ortiz, 665 F.3d at 915. This comment of dictum is clarified in the next sentence: "The direct appeal provision in [section] 158(d)(2)(A) also does not authorize us to review on direct appeal a bankruptcy judge's proposed findings of fact and conclusions of law." *Id.* As the Court further clarified, "[w]ithout a final judgment we lack a statutory basis for appellate jurisdiction," *id.*, confirming that its sole holding was limited to whether there was a final judgment below, which, under its holding on the dictates of Article III, there was not. The gratuitous comment that a statutorily core proceeding is not a statutorily non-core proceeding is banal and does not speak to what treatment befalls a *Stern* claim. Indeed, the *Ortiz* court was without appellate jurisdiction to issue any holding at all on the treatment of non-final bankruptcy court judgments. Gratuitous comments unnecessary to a court's holding cannot ground a circuit split.

fact and conclusions of law. See Pet. 32–34. The only close case that respondent did find, *Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug. 1, 2011), subsequently reversed itself upon further reflection, *Samson v. Western Capital Partners LLC (In re Blixseth)*, No. 09-60452-7, 2011 WL 6217416, at *1–3 (Bankr. D. Mont. Dec. 14, 2011). While one court has understood – in dicta – the *Ortiz* court the way petitioner does, see *Schafer v. Nextiraone Fed., LLC*, No. 1:12CV289, 2012 WL 2281828, at *4 (M.D.N.C. June 18, 2012), the District Court for the Northern District of Illinois, itself within the Seventh Circuit, has generally not understood *Ortiz* to be binding on the question, see, e.g., *Gecker v. Flynn (In re Emerald Casino, Inc.)*, 467 B.R. 128, 133–34 (N.D. Ill. 2012); *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 476 B.R. 535, 539 (N.D. Ill. 2012); see also *KHI Liquidation Trust v. Wisenbaker Builder Servs. (In re Kimball Hill, Inc.)*, 480 B.R. 894, 908 n.9 (Bankr. N.D. Ill. 2012) (stating in dicta that it would follow *Emerald Casino*'s understanding of the proposed findings issue); *Pulaski v. Dakota Fin., Inc. (In re Pulaski)*, 475 B.R. 681, 689 n.10 (Bankr. W.D. Wis. 2012) (stating in dicta, after discussing *Ortiz* at length, that bankruptcy courts may enter proposed findings on *Stern* claims).

This near-unanimity of approach makes sense, as a contrary holding would be absurd; it is impossible to concoct a plausible reason why Congress would choose to accord greater adjudicative authority to bankruptcy court judges over non-core claims, which are by definition only tangential to the bankruptcy process, than to more

centrally bankruptcy-connected claims, such as fraudulent conveyances. See generally *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (discussing absurdity doctrine). EBIA's suggestion that the Seventh Circuit adopted this absurd position is inaccurate. As the court below summarized in rejecting petitioner's radical position: "Stripping the bankruptcy courts of the power to entertain state-law counterclaims in *any* capacity would have roiled the bankruptcy schema" and be inconsistent with *Stern*'s insistence it was a "narrow" opinion that did not "meaningfully change[] the division of labor in the current statute." Pet. App. 26a (internal quotation marks and citation to *Stern* omitted).

Finally, in trying to generate "confusion" among the lower courts over what the court below called the *Stern*-induced statutory "gap," *id.* at 23a–24a, petitioner discusses in its argument what some courts have done and what other courts have done in response, implying that there is a divergence of opinion. Pet. 33–34. In reality, *all* these cases agree that bankruptcy judges have authority to treat *Stern* claims as non-core. While some do it with standing orders of reference and others suggest such an order is unnecessary, all concur that bankruptcy courts can resolve *Stern* claims with reports and recommendations. EBIA marshals no case in which a bankruptcy court held it was without power to do anything on a *Stern* claim and was thus frozen, unable to proceed. Accordingly, there is neither conflict nor confusion in the lower courts requiring intervention.

C. Petitioner's Other Claims Are Meritless.

Respondent has not addressed each argument petitioner advances. Briefly, EBIA's position that the "hear and determine" textual authorization of bankruptcy court power under section 157(b)(2) would not suffice to empower a bankruptcy judge to enter proposed findings of fact and conclusions of law on *Stern* claims (because "proposing" is not "determining") finds scant support beyond an ambiguous reference to *Black's Law Dictionary*. Pet. 28. Nor is the general position that *Stern* created a "procedural morass" and thus requires revisitation at this early juncture well taken. On the contrary, far from offering revisitation, this Court should allow lower courts time to digest *Stern* and let legal arguments percolate to ripeness before (re-)weighing in.

CONCLUSION

The decision below was well reasoned and assisted by a dozen amici. There is no reason for this Court's intervention in this area so soon after *Stern*. One of petitioner's purported circuit conflicts does not exist. The other involves a brief passage in an isolated opinion (so far followed by no court) that invalidates a major component of the bankruptcy and magistrate judge system without so much as a reference to either's enabling statute, let alone this Court's recent pronouncements on implied consent under *Roell*.

For these and other foregoing reasons, Trustee Arkison opposes the petition for a writ of certiorari.

Respectfully submitted,

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MAY 20, 2013

REPLY BRIEF

No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Introduction 1

I. The Court should resolve whether, and in what circumstances, Congress's otherwise unconstitutional delegation of authority to non-Article III judges can be cured by litigant consent 2

II. Respondent ignores the textual and structural flaws in the court of appeals' holding that bankruptcy judges may propose findings of fact and conclusions of law in *Stern*-governed "core" proceedings 9

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

Cases:

Commodity Futures Trading Commission v. *Schor*, 478 U.S. 833 (1986) 3, 6

Duck v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), overruled by, *Executive Benefits Ins. Agency* v. *Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012) 7

Field v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421 (D. Haw. 2011) 10

M. Sobel, Inc. v. *Weinstein (In re Weinstein)*, 237 B.R. 567 (Bankr. E.D.N.Y. 1999) 8

N. Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 4, 12

Ortiz v. *Aurora Health Care, Inc.*, 665 F.3d 906 (7th Cir. 2012) 9, 10

Pacemaker Diagnostic Clinic of Am. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S. 824 (1984) 6

Roell v. *Withrow*, 538 U.S. 580 (2003) 4, 6, 7

Sec. Investor Protection Corp. v. *Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46 (S.D.N.Y. 2013) 5

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 6, 12

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) ..... *passim*

Cases—Continued:

Waldman v. *Stone*, 698 F.3d 910 (6th Cir. 2012), cert. denied, 133 S. Ct. 1604 (2013) 2

Statutes:

Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. 151 *et seq.*:
28 U.S.C. 157(b) 1
28 U.S.C. 157(b)(1) 6, 11
28 U.S.C. 157(c)(1) 11
28 U.S.C. 157(c)(2) 6
28 U.S.C. 158(a) 11
28 U.S.C. 636(c)(1) 6

Micellaneous:

Standing Order of Reference Re: Title 11 (In re), No. 12-misc-00032) (S.D.N.Y. Jan. 31, 2012) 10

INTRODUCTION

Respondent concedes that the petition presents a clear split between the Sixth and Ninth Circuits on Question One and the Seventh and Ninth Circuits are in disagreement on Question Two. Nor can respondent deny that the issues are of national importance. Indeed, more than a dozen amici responded to the court of appeals' sua sponte invitation for amicus briefs. Prompt resolution of the questions presented is essential to alleviate the disruptive uncertainty that has plagued bankruptcy proceedings since *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011).

The Ninth and Sixth Circuits sharply disagree on whether litigant consent can cure the Bankruptcy Code's unconstitutional grant of Article III authority to bankruptcy judges. That split was outcome determinative in this case, and, until resolved by this Court, it will cast doubt on the validity of countless proceedings before bankruptcy judges premised on litigant consent.

On the second question presented, respondent does not even defend the court of appeals' holding that bankruptcy courts may propose findings of fact and conclusions of law pursuant to 28 U.S.C. 157(b) in core proceedings governed by *Stern*. The text and structure of the statute make clear that Congress did not grant bankruptcy judges that authority, and it is not the role of the courts to fill this perceived statutory gap.

I. THE COURT SHOULD RESOLVE WHETHER, AND IN WHAT CIRCUMSTANCES, CONGRESS'S OTHERWISE UNCONSTITUTIONAL DELEGATION OF AUTHORITY TO NON-ARTICLE III JUDGES CAN BE CURED BY LITIGANT CONSENT

1. As respondent concedes (Br. in Opp. 12), the court of appeals' decision is in direct conflict with the Sixth Circuit's holding in *Waldman* v. *Stone*, 698 F.3d 910 (2012), cert. denied, 133 S. Ct. 1604 (2013). Respondent makes no effort to distinguish *Waldman*; nor could he. *Waldman* expressly held that a party cannot consent to a bankruptcy court exercising Article III power. Respondent disparages *Waldman*'s constitutional analysis as "cursory." Br. in Opp. 12. But it is respondent and the court below who fail to grasp the full import of the holding in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), that Congress's attempt to assign Article III authority to bankruptcy judges violates the separation of powers. *Cf. Waldman*, 698 F.3d at 918 (discussing *Stern*, 131 S. Ct. at 2609).

Until this circuit split is resolved, the validity of every judgment in an Article III "core" case entered by a bankruptcy court on the basis of litigant consent will remain in doubt. The uncertainty among litigants whether bankruptcy judgments will be binding in such cases will drastically increase the inefficiency, and costs, of bankruptcy proceedings.

Even if lower courts outside the Sixth Circuit decline to follow *Waldman*, that would not diminish the urgent need for this Court to resolve the existing circuit split. It would hardly be surprising if overworked Article III courts and bankruptcy judges whose authority is under threat would align to resist the transfer of a

significant number of cases from bankruptcy to district courts. *Cf.* Br. in Opp. 15 (citing three bankruptcy courts disagreeing with *Waldman*). But if the structural Article III violation identified in *Stern* cannot be cured by litigant consent, as the Sixth Circuit held, then lower courts' collective attempt to ignore that consequence is only further reason for this Court to exercise review and vindicate fully *Stern*'s holding.

2. The court of appeals' holding—that bankruptcy courts may, with litigant consent, exercise the judicial power of the United States without threating the Constitution's separation of powers—cannot be squared with *Stern* and *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986). *Stern* "emphatically" declared that Congress's grant to non-Article III bankruptcy judges of authority to enter final judgment on private rights of action—"the most prototypical exercise of judicial power," 131 S. Ct. at 2615—poses "a threat to the separation of powers," *id.* at 2620. *Schor* held that "[t]o the extent that this structural principle [of the separation of powers] is implicated in a given case, *the parties cannot by consent cure the constitutional difficulty*." 478 U.S. at 850–851 (emphasis added). Together, those holdings compel the conclusion that litigant consent cannot confer on bankruptcy courts authority to enter final judgment on private rights of action.

Respondent misreads *Stern* as approving waiver of an Article III violation. Br. in Opp. 17. The portion of *Stern* on which respondent relies concerned waiver of a *statutory* right, not consent to infringement of Article III. See 131 S. Ct. 2606–2608. Pierce Marshall had asserted a defamation claim against the bankruptcy estate of Vickie Lynn Marshall. *Id.* at 2601. He neither

possessed nor claimed an Article III right to district court adjudication of that proof of claim. See *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion) ("restructuring of debtor-creditor relations * * * is at the core of the federal bankruptcy power"). Instead, Pierce argued his defamation claim constituted a "personal injury tort" claim as to which he had a *statutory* right to district court adjudication, pursuant to Section 157(b)(5). The Court's discussion of Pierce's waiver, and its citation within that discussion to Section 157(c)(2), was in the context of holding that this *statutory* right was not jurisdictional and could be waived. See *Stern*, 131 S. Ct. at 2607. That holding is simply irrelevant to whether an Article III violation can be cured by litigant consent.

Respondent is likewise mistaken in suggesting that *Roell* v. *Withrow*, 538 U.S. 580 (2003), supports the court of appeals' Article III analysis. In *Roell*, the sharply divided Court decided only a question of statutory interpretation about the Federal Magistrates Act. *Id.* at 586–587. The Court's passing reference to "the Article III right" being "substantially honored," *id.* at 590, in no way undermines the force and effect of the Court's subsequent, comprehensive discussion of Article III in *Stern*. In any event, as discussed below, see *infra* 5–7, *Roell* is inapposite because (a) unlike the magistrates statute, Congress did not include consent as a limiting feature of bankruptcy judges' authority in core proceedings and (b) petitioner's conduct would not constitute implied consent under *Roell*'s standard.

3. The constitutional question presented in the petition is neither "case-specific," Br. in Opp. 20, nor "time-limited" in importance, *id.* at 26. The Sixth Circuit held that litigants cannot consent to bankruptcy

court adjudication of *Stern*-governed core claims. That issue will arise *whenever* consent is relied upon to permit bankruptcy court adjudication of claims designated as "core" by Congress, but as to which *Stern* held that Article III applies. The issue arises frequently because *Stern* applies beyond state law counterclaims to many causes of action designated "core," including fraudulent conveyance claims, Pet. App. 23a, and certain preferential transfer claims, see *Sec. Investor Protection Corp.* v. *Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46, 49–54 (S.D.N.Y. 2013).

4. Ironically, while respondent mischaracterizes the petition as "case-specific," he also contends (Br. in Opp. 5) that certiorari is unwarranted because petitioner's argument calls into question Section 157(c)(2), which authorizes bankruptcy judges to adjudicate non-core claims with litigant consent. If the Court's decision casts doubt on Section 157(c)(2), that is hardly reason to deny the present petition. But whether doubt is cast on Section 157(c)(2) by a decision reversing the court of appeals would depend on this Court's rationale. As the petition makes clear, the Court might distinguish between the constitutional significance of consent when Congress incorporates consent as a limit on the authority of non-Article III judges and when, as here, courts simply invoke consent post-hoc, attempting to salvage an unconstitutional statute.

If litigant consent is relevant to the Article III analysis, it is only insofar as consent is an express limiting feature of the statutory scheme. Unlike the statute at issue in *Schor*, the Federal Magistrates Act at issue in *Roell*, or even the Bankruptcy Code provisions governing non-core proceedings, the statutory scheme applicable to core proceedings does not condition bank-

ruptcy judges' authority on litigant consent. Compare, *Schor*, 478 U.S. at 855 ("decision to invoke [non-Article III] forum is left entirely to the parties"), 28 U.S.C. 636(c)(1) (conditioning magistrates' authority on consent), and 28 U.S.C. 157(c)(2) (conditioning bankruptcy judges' authority in non-core proceedings on consent), with 28 U.S.C. 157(b)(1) (granting bankruptcy judges unqualified authority to "hear and determine" core proceedings). Statutes that expressly limit non-Article III tribunals to adjudicating claims where the parties have consented arguably mitigate the threat to Article III's separation-of-powers function. There is no such limitation in Section 157(b), and it is not the courts' role to rewrite the statutory text. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996).

5. Respondent's reliance on *Roell* is doubly misplaced because the facts from which the court of appeals inferred consent here would not satisfy *Roell*. Under *Roell*, consent cannot be inferred when litigants are not "made aware of the need for consent and the right to refuse it." *Roell*, 538 U.S. at 590; see also *id.* at 587 n.5; *Pacemaker Diagnostic Clinic of Am.* v. *Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir.) (en banc) (Kennedy, J.) (voluntary consent is essential), cert. denied, 469 U.S. 824 (1984).

This case exemplifies why implied litigant consent cannot cure an Article III violation when consent is not incorporated as a limit in the statutory scheme. Because Section 157(b) does not require consent before a bankruptcy court can adjudicate a claim designated as "core," petitioner had no notice of its right to insist that respondent's summary judgment motion be adjudicated in the first instance by an Article III judge. Indeed, at the time petitioner supposedly waived its Article III

right by acquiescing in adjournment of petitioner's motion for a jury trial, binding Ninth Circuit precedent held that petitioner *was not* entitled to final disposition by an Article III judge. See *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), overruled by, Pet. App. 15a.[1]

The most the court of appeals could say in concluding that petitioner had "impliedly consented" to entry of judgment by a non-Article III judge is that petitioner "affirmatively assented to suspend its demands for a jury trial in district court." Pet. App. 29a. But, at most, petitioner agreed to suspend consideration of its assertion of a different constitutional right—its Seventh Amendment right to *trial before a jury*—until it was clear whether there would even be a trial. That is far from demonstrating "aware[ness] of the need for consent" to *pretrial adjudication* by a bankruptcy judge, or "the right to refuse it." *Roell*, 538 U.S. at 590.

6. The district court's purported de novo review was not the basis for the court of appeals' ruling, and is not reason to deny the petition. The court of appeals held that entry of final judgment by a bankruptcy court does not implicate separation-of-powers concerns "because bankruptcy judges are officers of the district court and are appointed by the Courts of Appeals" and

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[1] Although the panel below suggested that the court of appeals' decision in *Stern* foreshadowed *Mankin*'s demise, Pet. App. 32a, respondent acknowledges that the panel decision in *Stern* was not issued until *after* the status report (which petitioner did not join) upon which the panel below based its finding of implied consent, Br. in Opp. 24 n.13; Pet. App. 73a–76a.

such adjudication was therefore permissible with litigant consent. Pet. App. 27a n.1 (brackets and internal quotation marks omitted). That holding is directly contrary to *Stern*'s conclusion that "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains." 131 S. Ct. at 2619. Unless corrected, this erroneous holding will remain the law in the Ninth Circuit.

Moreover, petitioner did *not* receive an *initial determination* by the district court. The bankruptcy judge entered final judgment, and the district court merely exercised appellate review. See Pet. App. 41a, 53a–55a. The district court, for example, placed the burden on petitioner to demonstrate error in the bankruptcy court's reasoning. *Id.* at 47a ("Appellant has failed to show any error in the Bankruptcy Court's grant of summary judgment * * *."). And it applied a "substantial evidence" standard to its review of certain of the bankruptcy court's conclusions. *Id.* at 50a. It was the bankruptcy court, not the district court, that "exercise[d] the essential attributes of judicial power" by entering final judgment against petitioner. *Stern*, 131 S. Ct. at 2618–2619.

Such appellate review is a far cry from the initial determination by an Article III judge to which petitioner was entitled. Indeed, *Stern* rejected the argument that appellate review of bankruptcy court judgments is sufficient to satisfy Article III. See 131 S. Ct. at 2619. Limiting the involvement of an Article III judge to mere appellate review is especially problematic in the bankruptcy context, where there is a well-recognized perception that bankruptcy courts are institutionally predisposed to favor debtors. See, *e.g.*, *M.*

Sobel, Inc. v. *Weinstein (In re Weinstein)*, 237 B.R. 567, 574 (Bankr. E.D.N.Y. 1999).

II. RESPONDENT IGNORES THE TEXTUAL AND STRUCTURAL FLAWS IN THE COURT OF APPEALS' HOLDING THAT BANKRUPTCY JUDGES MAY PROPOSE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN *STERN*-GOVERNED "CORE" PROCEEDINGS

The court of appeals' holding that bankruptcy judges' authority to "hear and determine" so-called "core" proceedings includes authority to propose findings of fact and conclusions of law, subject to de novo district court review, is contrary to the statutory text and structure, and respondent does not defend it. Respondent nevertheless argues that certiorari is unwarranted because most lower courts agree with the result, if not the rationale, that bankruptcy judges should continue to propose findings and conclusions in "core" proceedings where *Stern* precludes them from entering final judgment. Even if the lower courts were in agreement (which they are not), convergence among bankruptcy judges and the district courts—who share institutional interests in maintaining the current division of authority—is hardly reason to deny the petition. To the contrary, it demonstrates that little would be gained from allowing this issue to percolate further.

Respondent's assertion of lower court unanimity is, in any event, incorrect. The Seventh Circuit has clearly stated that "claims [that] qualify as core proceedings" under Section 157(b) "do not fit under § 157(c)(1)" and that bankruptcy judges therefore do not have statutory authority to propose findings and conclusions in core proceedings. *Ortiz* v. *Aurora Health Care, Inc.*, 665

F.3d 906, 915 (2012). Respondent characterizes this as dictum, Br. in Opp. 29 n.17, but the Seventh Circuit plainly believed this discussion of the dichotomy regarding bankruptcy judges' authority in core and non-core proceedings was necessary to its holding, see *Ortiz*, 665 F.3d at 915. And, while respondent declares that "[t]he *Ortiz* case is odd," Br. in Opp. 27 n.16, he cannot escape that the decision below is directly contrary to the view expressed by the Seventh Circuit on precisely the same question.

Notably, although many lower courts have made clear their desire to remedy the statutory gap by allowing bankruptcy judges to propose findings and conclusions in core proceedings governed by *Stern*, those courts cannot agree on a construction of the statute supporting that remedy. Some, like the court of appeals, hold that authority to "hear and determine" core proceedings pursuant Section 157(b)(1) "encompasses" a lesser-included power to propose findings and conclusions. See, *e.g.*, App. 24a. Others have "recharacteriz[ed]" core proceedings subject to *Stern* as non-core proceedings governed by Section 157(c)(1), as respondent proposes. See, *e.g.*, Br. in Opp. i, 28; *Field* v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421, 427–428 (D. Haw. 2011). And still others have "enacted" standing orders of reference under Section 157(a) purporting to authorize proposed findings and conclusions in core proceedings governed by *Stern*. See, *e.g.*, *In re Standing Order of Reference Re: Title 11*, No. 12-misc-00032) (S.D.N.Y. Jan. 31, 2012). The reason these courts cannot agree on *what* statutory authority permits bankruptcy judges to propose findings and conclusions in core proceedings is that *none* exists. To the contrary,

the statute's text and structure make clear Congress did *not* confer that authority on bankruptcy judges.

It is telling that respondent does not defend the court of appeals' rationale that bankruptcy courts can propose findings and conclusions in core proceedings under Section 157(b)(1)'s grant of authority to "hear and determine" such actions. Pet. App. 24a. Congress uses the phrase "hear and determine" (which also appears in other statutes) to connote finality, not a non-final recommendation. See Pet. 27–30. Moreover, Congress provided for only *appellate* review of orders and judgments entered pursuant to Section 157(b). 28 U.S.C. 157(b)(1), 158(a). Nothing in the statute grants district courts authority to engage in de novo review of, or enter final judgment on, a bankruptcy court's decision in a "core" proceeding that has been referred to it. *Cf.* 28 U.S.C. 157(c)(1) (granting this authority in *non-core* proceedings).

Rather than defend the court of appeals, respondent asserts that bankruptcy courts may "recharacteriz[e]" core proceedings to which *Stern* applies as non-core proceedings and issue propose findings and conclusions under Section 157(c)(1). Br. in Opp. 28. By its plain terms, however, Section 157(c)(1) applies only to a proceeding that is "not a core proceeding." 28 U.S.C. 157(c)(1). As *Stern* made clear, and as the court of appeals recognized, courts must honor Congress's designation of proceedings as core or non-core. 131 S. Ct. at 2604–2605; Pet. App. 24-25a (claims subject to *Stern* "remain in the core").

Even if all of the lower courts (apart from the Seventh Circuit) agreed, their unanimity would not change the fact that it is not the role of the judicial branch to

"rewrite the statutory scheme in order to approximate what [it] think[s] Congress might have wanted had it known that [a provision] was beyond its authority." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996); *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982). This Court should reverse the lower courts' attempt to do just that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2013

JOINT APPENDIX

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No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

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JOINT APPENDIX

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TABLE OF CONTENTS

Page

Relevant Docket Entries:

United States Bankruptcy Court for the Western District of Washington (Seattle) (06-01306-KAO) 1

United States Bankruptcy Court for the Western District of Washington (Seattle) (06-11721-KAO) 4

United States Bankruptcy Court for the Western District of Washington (Seattle) (08-01132-KAO) 8

United States District Court for the Western District of Washington (Seattle) (2:10CV00171-RAJ) 32

United States District Court for the Western District of Washington (Seattle) (2:10CV00929-MJP) 35

United States Court of Appeals for the Ninth Circuit (11-35162) 39

Complaint to Avoid Preferential Transfers, Fraudulent Transfer, for Finding of Successor Liability, for Equitable Subordination of Claims, for Conversion, for Accounting, for Substantive Consolidation and for Breach of Fiduciary Duty (06-11721) (filed May 30, 2008) 49

Answer of Defendant Executive Benefits Insurance Agency (06-11721) (filed Aug. 1, 2008) 79

Memorandum in Support of Motion to Vacate Trial Date (Dec. 21, 2009) ..... Pet. App. 77a

Motion to Vacate Trial Date (filed 06-11721) (Dec. 21, 2009) 95

Plaintiff's Objection/Response to Motion to Vacate Order Setting Trial Date (06-11721) (filed Dec. 30, 2009) 97

Order Vacating Trial Date and Referring Case to District Court Judge (06-11721) (filed Dec. 31, 2009) 101

Minute Order (10-00171) (filed Feb. 25, 2010) 104

Joint Status Report (Mar. 12, 2010) ..... Pet. App. 73a

Plaintiff's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant Executive Benefits Insurance Agency (06-11721, 08-1132) (filed Mar. 17, 2010) 106

Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant Executive Benefits Insurance Agency, Inc. (06-11721, 08-1132) (filed Mar. 17, 2010) 108

Declaration of Michael Quackenbush in Support Of Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment Against Solely EBIA (06-11721, 08-1132) (filed Mar. 17, 2010) ... 139

Order (Mar. 26, 2010) ..... Pet. App. 62a

Memorandum in Opposition to Motion for Summary Judgment (06-11721, 08-1132) (filed Apr. 9, 2010) 143

Declaration of Nicolas Paleveda (06-11721, 08-1132) (filed Apr. 9, 2010) 169

Transcript (06-11721, 08-1132) (Apr. 14, 2010) 181

Bankruptcy Court Judgment (May 27, 2010) ..... Pet. App. 53a

Bankruptcy Court Opinion (May 27, 2010) ..... Pet. App. 56a

Election to Have Appeal heard in District Court (06-11721, 08-1132) (filed June 4, 2010) 186

Order (July 2, 2010) ..... Pet. App. 60a

District Court Opinion (Jan. 21, 2011) ..... Pet. App. 41a

Judgment (10-929) (filed Jan. 24, 2011) 188

Application for Writ of Garnishment – People's Bank (06-11721, 08-1132) (filed Sept. 30, 2011) 189

Writ of Garnishment – People's Bank (06-11721, 08-1132) (filed Sept. 30, 2011) 191

Application for Writ of Garnishment - KeyBank (06-11721, 08-1132) (filed Sept. 30, 2011) 194

Writ of Garnishment – KeyBank (06-11721, 08-1132) (filed Sept. 30, 2011) 196

Application for Writ of Garnishment - Bank of America (06-11721, 08-1132) (filed Sept. 30, 2011) 200

Writ of Garnishment – Bank of America (06-11721, 08-1132) (filed Sept. 30, 2011) 202

Order (Nov. 4, 2011) ..... Pet. App. 58a

Court of Appeals Opinion (Dec. 4, 2012) ... Pet. App. 1a

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON (SEATTLE)

Adversary Proceeding: 06-01306-KAO

IN RE: BELLINGHAM INSURANCE AGENCY, INC.,
DEBTOR

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/30/2006	1	Notice of Removal of Case 06 2 01256 5 From Superior Court of Washington For Whatcom County to the United States Bankruptcy Court, Western District of Washington. Filed by James A Sturdevant on behalf of Executive Benefits Insurance Agency, Marjorie Ewing, Nicholas Paleveda, Peter Pearce, Jane Doe Pearce, and ARIS Inc. Filed in Superior Court by Paul R Hess, Glenn D Price, Charles P Farrington. Additional attachment(s) added on 7/6/2006 (USBC Staff Crosser, Kathleen). Modified on 7/6/2006 to cor-

DATE	DOCKET NUMBER	PROCEEDINGS
		rect party names and reflect Notice of Removal. (USBC Staff Crosser, Kathleen). Additional attachment(s) added on 7/10/2006 (USBC Staff - Isreal, Sandra). Additional attachment(s) added on 7/14/2006 (USBC Staff - Isreal, Sandra). (Entered: 06/30/2006 at 16:18:49)
		* * * * *
10/27/2006		Minutes. Pretrial Conference Hearing Held. Appearances: James A. Sturdevant (telephonically) representing defendants; Eric B. Zimbelman representing Plaintiffs; Denice Moewes representing trustee. (Related document(s) 3. : Trial scheduled for 6/25/2007 at 09:30 AM at Judge Glover's Courtroom, U.S. Courthouse, Room 7106. Plaintiff to follow Rule 16; Discovery cutoff is 6/1/07; Dispositive motions to be heard on or before 6/15/07. Order to be entered. (USBC Staff - Kelley, Kim) (Entered: 10/27/2006 at 10:57:20)

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
6/10/2011	32	ORDER Dismissing Adversary Proceeding and Closing File. (Related document(s) 31 Letter From Chambers). Case Can Close: 7/1/2011. (PBR) (Entered: 06/10/2011 at 15:42:37)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON (SEATTLE)

06-11721-KAO

IN RE: BELLINGHAM INSURANCE AGENCY, INC.,
DEBTOR

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/31/2008	149	Adversary case 08-01132. Complaint against Executive Benefits Insurance Agency Inc, ARIS Inc, Nicholas Palaveda, Marjorie Ewing, Peter Pearce, Jane Doe Pearce to Avoid Preferential Transfers, Fraudulent Transfers, for Finding of Successor Liability, For Equitable Subordination of Claims, for Conversion, for Accounting, for Substantive Consolidation and for Breach of Fiduciary Duty. Filed by Denice E Moewes on behalf of Peter H Arkison. Nature of Suit: (12 (Recovery of money/property 547 preference)), (13 (Recovery of mon-

DATE	DOCKET NUMBER	PROCEEDINGS
		ey/property - 548 fraudulent transfer)), (81 (Subordination of claim or interest)) (Moewes, Denice) Modified on 6/2/2008 (USBC Staff Tamayao, Cyndi). (Entered: 05/31/2008 at 15:01:23)
		* * * * *
6/10/2008	154	ORDER Determining That Lafayette Life Insurance Proceeds Do Not Constitute Property of the Estate and Directing That Funds Be Turned Over to Charles P Farrington and Barring Nicholas Palaveda From Filing Further Pleadings in This Case Absent Prior Approval By This Court (Related document(s) 113 Ch 7 Tr Motion and Notice of Hearing,,). (USBC Staff Hardy, Cynthia) (Entered: 06/10/2008 at 10:14:31)
		* * * * *
6/6/2008	155	Notice of Appeal to BAP Court. Re: BK Internal Appeal No: 08-S013, BAP #08-1149. Fee Due $ 255 (Related document(s) 154 Order GENERIC,). Filed by Nicholas Arthur

DATE	DOCKET NUMBER	PROCEEDINGS
		Paleveda. Record Transmission due by 6/30/2008, (USBC Staff - Isreal, Sandra) Modified on 6/10/2008 to show correct filing date (USBC Staff Isreal, Sandra). Modified on 10/21/2008 to add BAP case number (USBC Staff Isreal, Sandra). (Entered: 06/10/2008 at 14:27:37)
		* * * * *
8/6/2008	170	Third Party Answer to Amended Complaint (Related document(s) 169 Amend Complaint,)... Filed by Jeffrey B Teichert on behalf of Executive Benefits Design Group. (Teichert, Jeffrey) (Entered: 08/06/2008 at 12:21:56)
8/6/2008	171	Supplemental Filing of Jury Demand. Filed by Jeffrey B Teichert on behalf of Executive Benefits Design Group. (Related document(s) 170 Answer to Amended Complaint). (Teichert, Jeffrey) (Entered: 08/06/2008 at 12:28:42)
		* * * * *
4/6/2009	175	Memorandum from BAP, Internal Appeal No: 08-S013,

DATE	DOCKET NUMBER	PROCEEDINGS
		BAP # 08-1149, Decision Affirmed (Related document(s) 155 Notice of Appeal). (USBC Staff Isreal, Sandra) (Entered: 04/09/2009 at 12:17:57)
		* * * * *
4/23/2009	177	Mandate from: BAP regarding our Internal Appeal number 08-1149 and BAP Appeal Number 08-1149 (Related document(s) 155 Notice of Appeal, 175 Letter re Appeal, 176 Generic Notice). (USBC Staff Isreal, Sandra) Modified on 4/23/2009 to show correct filing date (USBC Staff Isreal, Sandra). (Entered: 04/23/2009 at 14:24:55)
		* * * * *

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON (SEATTLE)

Adversary Proceeding: 08-01132-KAO

IN RE: BELLINGHAM INSURANCE AGENCY, INC.,
DEBTOR

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/31/2008	1	Adversary case 08-01132. Complaint against Executive Benefits Insurance Agency Inc, ARIS Inc, Nicholas Palaveda, Marjorie Ewing, Peter Pearce, Jane Doe Pearce *to Avoid Preferential Transfers, Fraudulent Transfer, for Finding of Successor Liability, For Equitable Subordination of Claims, for Conversion, for Accounting, for Substantive Consolidation and for Breach of Fiduciary Duty.* Filed by Denice E Moewes on behalf of Peter H Arkison. Nature of Suit: (12 (Recovery of money/property 547 preference)), (13 (Recovery of money/property 548 fraudu-

DATE	DOCKET NUMBER	PROCEEDINGS
		lent transfer)), (81 (Subordination of claim or interest)) (Moewes, Denice) Modified on 6/2/2008 (USBC Staff - Tamayao, Cyndi). (Entered: 05/31/2008 at 15:01:23)
6/3/2008	2	Summons and Pretrial Conference with original summons issued and provided to plaintiff's attorney via email confirmation served on ARIS Inc Answer Due 7/3/2008; Marjorie Ewing Answer Due 7/3/2008; Executive Benefits Insurance Agency Inc Answer Due 7/3/2008; Nicholas Palaveda Answer Due 7/3/2008; Jane Doe Pearce Answer Due 7/3/2008; Peter Pearce Answer Due 7/3/2008. Pretrial scheduled for 8/13/2008 at 09:00 AM at Marysville Municipal Court (USBC Staff - Kelley, Kim) (Entered: 06/03/2008 at 14:45:13)
		* * * * *
7/3/2008	4	Motion *motion extend time to file answer* Filed by James A Sturdevant on behalf of Jane Doe Pearce, Peter Pearce

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: 1 Proposed Order) (Sturdevant, James) (Entered: 07/03/2008 at 16:07:28)
		* * * * *
7/9/2008	6	ORDER Extending Time To File Answer (Related Doc # 4) Signed on 7/9/2008. . (USBC Staff Isreal, Sandra) (Entered: 07/09/2008 at 08:53:10)
		* * * * *
7/11/2008	8	Answer to Complaint. Filed by Nicholas Palaveda Nicholas Palaveda. (USBC Staff Isreal, Sandra) (Entered: 07/11/2008 at 15:37:58)
		* * * * *
7/24/2008	10	Answer to Complaint. Filed by Donald A Bailey on behalf of ARIS Inc, Marjorie Ewing. (Bailey, Donald) (Entered: 07/24/2008 at 11:02:15)
8/13/2008		Minutes. Summons and Pretrial Conference Held. Appearances: Donald A. Bailey representing Marjorie Ewing, defendant; James A. Sturdevant representing Peter and

DATE	DOCKET NUMBER	PROCEEDINGS
		Jane Doe Pearce, defendant; Peter Arkison representing plaintiff. (Related document(s) 2. : Trial scheduled for 5/18/2009 at 09:30 AM at Judge Glover's Courtroom, U.S. Courthouse, Room 7106; (USBC Staff - Kelley, Kim) (Entered: 08/18/2008 at 16:02:46)
		* * * * *
9/19/2008	13	Answer to Complaint. Filed by James A Sturdevant on behalf of Jane Doe Pearce, Peter Pearce. (Sturdevant, James) (Entered: 09/19/2008 at 16:51:39)
		* * * * *
12/23/2008	14	Trustee's Motion *for Order Consolidating Adversary Proceeding No. 06-1306 with Adversary Proceeding No. 08-1132* and Notice of Hearing Filed by Denice E Moewes on behalf of Peter H Arkison. Scheduled for 1/23/2009 at 09:30 AM at Judge Glover's Courtroom, U.S. Courthouse, Room 7106. Response due by 1/16/2009.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Moewes, Denice) (Entered: 12/23/2008 at 13:54:00)
		* * * * *
1/22/2009		Minutes. Trustee's Motion for Order Consolidating Adversary Proceeding No. 06-1306 with Adversary Proceeding No. 08-1132 and Notice of Hearing Filed by Denice E Moewes on behalf of Peter H Arkison. (Related document(s) 14. : Agreed order to be entered per Denice Moewes. (USBC Staff Kelley, Kim) (Entered: 01/22/2009 at 15:48:39)
		* * * * *
9/29/2009	18	Trustee's Motion for Summary Judgment *on Plaintiff's Complaint to Recover Fraudulent Transfers* with Notice of Hearing. Filed by Denice E Moewes on behalf of Peter H. Arkison The Hearing date is set for 10/23/2009 at 09:30 AM at Judge Glover's Courtroom, U.S. Courthouse, Room 7106. Response due by 10/16/2009. (Moewes, Denice) (Entered: 09/29/2009 at

DATE	DOCKET NUMBER	PROCEEDINGS
		17:59:47)
9/29/2009	19	Notice of Hearing *on Plaintiff's Motion for Summary Judgmnent on Plaintiff's Complaint to Recover Fraudulent Transfers* (Related document(s) 18 Motion for Summary Judgment). Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 09/29/2009 at 18:03:00)
9/29/2009	20	Plaintiff's Memorandum *in Support of Plaintiff's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers* (Related document(s) 18 Motion for Summary Judgment, 19 Hearing Notice)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 09/29/2009 at 18:06:42)
9/29/2009	21	Declaration *of Michael Quackenbush in Support of Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers*

DATE	DOCKET NUMBER	PROCEEDINGS
		(Related document(s) 18 Motion for Summary Judgment, 19 Hearing Notice, 20 Memorandum)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 09/29/2009 at 18:21:13)
10/15/2009	22	Affidavit Of Nicholas Paleveda (Related document(s) 18 Motion for Summary Judgment)... Filed by Nicholas Palaveda. (USBC Staff Isreal, Sandra) (Entered: 10/16/2009 at 11:46:51)
10/15/2009	23	Memorandum Of Law Against Summary Judgment (Related document(s) 18 Motion for Summary Judgment)... Filed by Nicholas Palaveda. (USBC Staff Isreal, Sandra) (Entered: 10/16/2009 at 11:49:11)
		* * * * *
11/12/2009	24	Response to *Trustee's Motion for Partial Summary Judgment* (Related document(s) 18 Motion for Summary Judgment, Minute Hearing)...

DATE	DOCKET NUMBER	PROCEEDINGS
		Filed by Donald A Bailey on behalf of ARIS Inc, Marjorie Ewing. (Bailey, Donald) (Entered: 11/12/2009 at 12:30:06)
11/12/2009	25	Declaration *of Donald A Bailey in Support of Response to Trustee's Motion for Partial Summary Judgment* (Related document(s) 18 Motion for Summary Judgment, Minute Hearing, 24 Response)... Filed by Donald A Bailey on behalf of ARIS Inc, Marjorie Ewing. (Bailey, Donald) (Entered: 11/12/2009 at 12:32:10)
11/12/2009	26	Declaration *of John Logan in Support of Response to Trustee's Motion for Partial Summary Judgment* (Related document(s) 18 Motion for Summary Judgment, Minute Hearing, 24 Response)... Filed by Donald A Bailey on behalf of ARIS Inc, Marjorie Ewing. (Bailey, Donald) (Entered: 11/12/2009 at 12:34:05)
11/12/2009	27	Declaration *of Marjorie Ewing in Support of Response to Trustee's Motion for Partial Summary Judg-*

DATE	DOCKET NUMBER	PROCEEDINGS
		ment (Related document(s) 18 Motion for Summary Judgment, Minute Hearing, 24 Response)... Filed by Donald A Bailey on behalf of ARIS Inc, Marjorie Ewing. (Attachments: 1 Exhibit 1 12 Invoices from ARIS to BIA) (Bailey, Donald) (Entered: 11/12/2009 at 12:39:08)
		* * * * *
11/17/2009	28	Trustee's Reply *to Defendant's Objection to Trustee's Motion for Summary Judgment* (Related document(s) 18 Motion for Summary Judgment, 19 Hearing Notice, 20 Memorandum, 21 Declaration, 22 Affidavit, 23 Memorandum, Notice to Court of Motion to be Continued, Minute Hearing, Minute Hearing, 24 Response, 25 Declaration, 26 Declaration, 27 Declaration, Notice to Court of Intent to Argue)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 11/17/2009 at 17:56:27)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/17/2009	30	Declaration *of Michael Quackenbush in Reply to Defendants' Objection to Motion for Summary Judgment* (Related document(s) 18 Motion for Summary Judgment, 19 Hearing Notice, 20 Memorandum, 21 Declaration, 28 Reply)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 11/17/2009 at 18:08:04)
11/20/2009		Minutes. Hearing Held. Appearances: Denice E. Moewes representing plaintiff; Donald A. Bailey representing defendant. {Related document(s) 18 Trustee's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers with Notice of Hearing. Filed by Denice E Moewes on behalf of Peter H. Arkison. : Summary judgment motion is denied. (Related document(s) 11 Notice of Trial and Order Setting Deadlines. : Trial continued to 1/4/2010 at 09:30

DATE	DOCKET NUMBER	PROCEEDINGS
		AM at Judge Glover's Courtroom, U.S. Courthouse, Room 7106. (USBC Staff - Kelley, Kim) (Entered: 11/20/2009 at 12:22:18)
		* * * * *
12/21/2009	31	Defendant's Motion *Motion to Vacate Trial Date* Filed by Jeffrey B Teichert on behalf of Executive Benefits Insurance Agency Inc (Teichert, Jeffrey) (Entered: 12/21/2009 at 02:32:51)
		* * * * *
12/22/2009	34	Defendant's Memorandum *in Support of Motion to Vacate Trial Date* (Related document(s) 31 Motion)... Filed by Jeffrey B Teichert on behalf of Executive Benefits Insurance Agency Inc. (Teichert, Jeffrey) (Entered: 12/22/2009 at 08:35:57)
12/30/2009	35	Declaration *Of Attorney In Support Of Response To Motion To Vacate* (Related document(s) 31 Motion, 32 Motion). Proof of Service. Filed by James A Sturdevant on behalf of Jane Doe Pearce.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Sturdevant, James) (Entered: 12/30/2009 at 14:01:00)
12/30/2009	36	Response to (Related document(s) 31 Motion, 32 Motion). Proof of Service. Filed by James A Sturdevant on behalf of Jane Doe Pearce, Peter Pearce. (Attachments: 1 Proposed Order) (Sturdevant, James) (Entered: 12/30/2009 at 14:11:43)
12/30/2009	37	Received UNSIGNED Order. Forwarded to Chambers for Judge's Signature. Filed by James A Sturdevant on behalf of Jane Doe Pearce, Peter Pearce. (Related document(s) 31 Motion, 32 Motion). (Sturdevant, James) (Entered: 12/30/2009 at 14:17:25)
12/30/2009	38	Plaintiff's Objection/*Response to Motion to Vacate Order Setting Trial Date* (Related document(s) 31 Motion, 34 Memorandum, 35 Declaration, 36 Response, 37 Received UNSIGNED Order)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		12/30/2009 at 15:43:12)
12/31/2009	39	ORDER Vacating Trial Date and Referring Case to District Court Judge (Related Doc # 31), Signed on 12/31/2009. (USBC Staff Birkland, Judy) (Entered: 12/31/2009 at 15:06:12)
		* * * * *
1/4/2010		Minutes. ORDER Vacating Trial Date and Referring Case to District Court Judge. (Related document(s) 39. : Trial is stricken. Case referred to US District Judge for trial. (USBC Staff Kelley, Kim) (Entered: 01/05/2010 at 12:50:25)
1/28/2010	41	Transmittal of Bankruptcy Matters to the U.S. District Court #10-0171 Judge Richard A Jones (Related document(s) 39 Order Re Motion to). (USBC Staff Redmond, Danny) (Entered: 01/28/2010 at 10:56:32)
3/17/2010	42	Plaintiff's Motion for Summary Judgment *on Plaintiff's Complaint to Recover Fraudulent Transfers Solely*

DATE	DOCKET NUMBER	PROCEEDINGS
		as the Defendant Executive Benefits Insurance Agency with Notice of Hearing. Filed by Denice E Moewes on behalf of Peter H. Arkison The Hearing date is set for 4/14/2010 at 09:30 AM at Marysville Municipal Court. Response due by 4/7/2010. (Moewes, Denice) (Entered: 03/17/2010 at 16:12:17)
3/17/2010	43	Notice of *Hearing on Plaintiff's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant Executive Benefits Insurance Agency* (Related document(s) 42 Motion for Summary Judgment). Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 03/17/2010 at 16:17:38)
3/17/2010	45	Plaintiff's Memorandum *in Support of Plaintiff's Motion for Summary Judgment Against Solely EBIA* (Related document(s) 42 Motion for Summary Judgment, 43 Generic Notice, 44 Declara-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 03/17/2010 at 17:31:06)
3/18/2010	46	Amended Declaration *of Denice Moewes in Support of Trustee's Motion for Summary Judgment Against Solely EBIA (Amended to Correct Date of Hearing and Hearing Location* (Related document(s) 42 Motion for Summary Judgment, 43 Generic Notice, 44 Declaration, 45 Memorandum)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 03/18/2010 at 10:15:17)
3/19/2010	47	Declaration *of Michael Quackenbush in Support of Plantiff's Memorandum in Support of Motion for Summary Judgment Aganist Solely EBIA* (Related document(s) 42 Motion for Summary Judgment, 43 Generic Notice, 44 Declaration, 45 Memorandum, 46 Declaration)... Filed by Denice E

DATE	DOCKET NUMBER	PROCEEDINGS
		Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 03/19/2010 at 16:08:00)
4/9/2010	48	Defendant's Response to (Related document(s) 42 Motion for Summary Judgment)... Filed by Jeffrey B Teichert on behalf of Executive Benefits Insurance Agency Inc. (Attachments: 1 Pleading Declaration of Nicholas Paleveda) (Teichert, Jeffrey) (Entered: 04/09/2010 at 11:32:15)
		* * * * *
4/14/2010		Minutes. Hearing Held. Appearances: Jeffrey Teichert representing Defendant; Denice E. Moewes representing plaintiff. (related document(s): 42 Motion for Summary Judgment filed by Peter H. Arkison) filed by Denice E Moewes. : Summary Judgment granted, order to be entered. (KK) (Entered: 04/14/2010 at 15:23:32)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/28/2010	51	Motion *Requesting the Recusal Of Judge Glover Based On An Affidavit Of Prejudice* with Notice of Hearing. Filed by Nicholas Palaveda The Hearing date is set for 5/21/2010 at 09:30 AM at Judge Glover's Courtroom, U.S. Courthouse, Room 7106. Response due by 5/14/2010. (USBC Staff Isreal, Sandra) (Entered: 04/28/2010 at 15:54:00)
4/28/2010	52	Affidavit Of Prejudice (Related document(s) 51 Motion)... Filed by Nicholas Palaveda. (USBC Staff Isreal, Sandra) (Entered: 04/28/2010 at 15:55:51)
4/28/2010	53	Proof of Service. Filed by Nicholas Palaveda. (Related document(s) 52 Affidavit). (USBC Staff - Isreal, Sandra) (Entered: 04/28/2010 at 15:57:29)
		* * * * *
5/14/2010	54	Trustee's Response to *Motion for Recusal of Judge Thomas T. Glover* (Related document(s) 51 Motion, 52 Affida-

DATE	DOCKET NUMBER	PROCEEDINGS
		vit)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 05/14/2010 at 19:15:55)
		* * * * *
5/18/2010	55	Notice of Presentation of Order. Description: *Order Granting Plantiff's Motion for Summary Judgement on Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant Executive Benefit Insurance Agency and to .mpose Successor Liability for Allowed Debts of Debtor* Filed by Denice E Moewes on behalf of Peter H. Arkison. Presentment to be held on 5/26/2010 at 09:30 AM at Marysville Municipal Court. (Moewes, Denice) (Entered: 05/18/2010 at 15:21:57)
5/18/2010	56	Reply To Trustee's Response to Motion For Recusal (Related document(s) 51 Motion, 54 Response)... Filed by Nicholas Palaveda. (USBC Staff Isreal, Sandra) (Entered: 05/21/2010 at 09:00:38)

DATE	DOCKET NUMBER	PROCEEDINGS
5/18/2010	57	Declaration Of Nicholas Paleveda In Reply To Trustee's Respnse To Motion For Recusal (Related document(s) 51 Motion, 54 Response)... Filed by Nicholas Palaveda. (Attachments: 1 Attachment) (USBC Staff - Isreal, Sandra) (Entered: 05/21/2010 at 09:38:12)
5/21/2010		Minutes. Hearing Held. Appearances: Denice Moewes representing plaintiff; Nicholas Palaveda, counsel. (related document(s): 51 Motion Requesting the Recusal Of Judge Glover Based On An Affidavit Of Prejudice with Notice of Hearing filed by Nicholas Palaveda. : Motion is denied and sanction request is denied. (KK) (Entered: 05/21/2010 at 09:52:20)
		* * * * *
5/26/2010	59	Declaration of No Objection *to Plantiff's Notice of Presentation of Order Granting Plaintiff's Motion for Summary Judgment and Judgment* (Related document(s) 42 Motion for Summary Judg-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment, 43 Generic Notice, 45 Memorandum, 46 Declaration, 47 Declaration, 48 Response, Notice to Court of Intent to Argue, 49 Motion, Minutes Hearing Held, 55 Notice of Presentation of Order)... Filed by Denice E Moewes on behalf of Peter H. Arkison. (Moewes, Denice) (Entered: 05/26/2010 at 10:13:34)
		* * * * *
5/27/2010	62	ORDER Granting Plaintiff's Motion for Summary JUDGMENT On Plaintiff's Complaint To Recover Fraudulent Transfers Solely As To Defendant Executive Benefits Insurance Agency And To Impose Successor Liability For Allowed Debt Of Debtor (Related Doc # 42) Signed on 5/27/2010. . (USBC Staff Isreal, Sandra) (Entered: 05/27/2010 at 15:43:13)
5/27/2010	63	JUDGMENT (Related document(s) 42 Motion for Summary Judgment). Case Can Close: 6/17/2010. (USBC Staff Isreal, Sandra) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		05/27/2010 at 15:45:54)
		* * * * *
6/4/2010	68	Defendant's Notice of Appeal to District Court. Internal Appeal #10-S017, USDC Appeal #10-CV-929. Fee Due $ 255 (Related document(s) 62 Order Re Motion for Summary Judgment, 63 Judgment). Filed by Jeffrey B Teichert on behalf of Executive Benefits Insurance Agency Inc. Record Transmission due by 06/25/2010, (Teichert, Jeffrey) Modified on 6/7/2010 to add appeal numbers (USBC Staff Isreal, Sandra). (Entered: 06/04/2010 at 23:26:44)
6/4/2010	69	Election to Appeal to District Court. (Related document(s) 68 Notice of Appeal). Filed by Jeffrey B Teichert on behalf of Executive Benefits Insurance Agency Inc. (Teichert, Jeffrey) (Entered: 06/04/2010 at 23:30:14)
6/7/2010	70	Notice of Transmittal of Appeal to District Court Combined with Service of Notice

DATE	DOCKET NUMBER	PROCEEDINGS
		of Appeal BK Internal Appeal Number 10-S017 (Related document(s) 68 Notice of Appeal). (Attachments: 1 Counsel Letter 2 Notice of Appeal 3 Order Being Appealed 4 Election To District Court 5 Docket Sheet) (USBC Staff - Isreal, Sandra) (Entered: 06/07/2010 at 12:33:03)
		* * * * *
6/7/2010	73	ORDER Denying Nicholas Palaveda's Motion Requesting Recusal Of Judge Glover Based On An Affidavit Of Predjudice (Related Doc # 51) Signed on 6/7/2010. . (USBC Staff Isreal, Sandra) (Entered: 06/07/2010 at 15:36:00)
		* * * * *
1/24/2011	89	Final Order By Judge Pechman, at USDC. Re: Appeal # 10-S017; USDC #10-cv-020 Appeal Dismissed and Affirmed with Bankruptcy Court. (Related document(s) 68 Notice of Appeal, 81 Certificate of Readiness). Check Status of Appeal by 2/28/2011.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Judgment In Civil Case) (SJI) (Entered: 01/28/2011 at 12:35:17)
9/30/2011	90	Application for Writ of Garnishment/Execution. (People's Bank). Filed by Denice E Moewes on behalf of Peter H. Arkison. (SJI) Modified on 9/30/2011 (to add docket text) (USBC Staff Isreal, Sandra). (Entered: 09/30/2011 at 15:11:58)
9/30/2011	91	Writ of Garnishment/Execution. (People's Bank). (SJI) (Entered: 09/30/2011 at 15:14:42)
9/30/2011	92	Application for Writ of Garnishment/Execution. (Key-Bank). Filed by Denice E Moewes on behalf of Peter H. Arkison. (SJI) Modified on 9/30/2011 (to add docket text) (USBC Staff Isreal, Sandra). (Entered: 09/30/2011 at 15:16:56)
9/30/2011	93	Writ of Garnishment/Execution. (Key Bank). (SJI) (Entered: 09/30/2011 at 15:18:23)

DATE	DOCKET NUMBER	PROCEEDINGS
9/30/2011	94	Application for Writ of Garnishment/Execution. (Bank of America). Filed by Denice E Moewes on behalf of Peter H. Arkison. (SJI) (Entered: 09/30/2011 at 15:19:15)
9/30/2011	95	Writ of Garnishment/Execution. (Bank of America). (SJI) (Entered: 09/30/2011 at 15:20:07)
		* * * * *
12/4/2012	99	Opinion from 9th Circuit Court Re: Appeal on Appellate Case Number: 10-00929, Affriming the District Court's Affirmance of Bankruptcy Court's Summary Judgment. (SJI) (Entered: 01/04/2013 at 10:40:27)
12/31/2012	100	MANDATE, at 9th Circuit Court Of Appeals. Re: Appeal # 10-S017; Affirmed. (Related document(s) 68 Notice of Appeal, 89 Final Order on Appeal, 99 Order from Circuit Court). (SJI) (Entered: 01/04/2013 at 10:44:52)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON (SEATTLE)

2:10CV00171-RAJ

PETER ARKISON

v.

EXECUTIVE BENEFITS INSURANCE ET AL.

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/18/2010	1	MOTION to Withdraw the Reference by Defendants Peter Pearce, Jane Doe Pearce. Oral Argument Requested. (Attachments: # 1 Transmittal of Record, # 2 Docket Sheet, # 3 Motion To Vacate Trial, # 4 Defendant's Memorandum In Support of Motion to Vacate Trial Date, # 5 Declaration of James Sturdevant In Support of Response to Motion to Vacate Trial Date, # 6 Response Of Peter Pearce To Motion To Vacate Trial Date, # 7 Plaintiff's Objection/Response to Motion to Vacate Order Setting Trial Date) Noting Date 1/29/2010, (Bankruptcy Ap-

DATE	DOCKET NUMBER	PROCEEDINGS
		peals (Sea),) (entered by Redmond, Danny) (Entered: 01/28/2010)
		* * * * *
2/25/2010	3	MINUTE ORDER, by Judge Richard A. Jones. The court directs the parties to meet and confer and file a Joint Status Report no later than 3/12/2010. (VE) (Entered: 02/25/2010)
3/15/2010	4	JOINT STATUS REPORT by Plaintiff Peter H Arkison. (Moewes, Denice) Modified on text 3/16/2010 (CL). (Entered: 03/15/2010)
3/26/2010	5	ORDER by Judge Richard A Jones. The Court RENOTES FOR 6/15/2010 1 Motion to Withdraw the Reference. Joint Status Report ddl set for 6/15/2010. (CL) (cc: dft N. Palavda) (Entered: 03/29/2010)
6/22/2010	6	MINUTE ORDER, by Judge Richard A. Jones. It is ordered that counsel show cause by 6/30/2010 why this action should not be dismissed for failing to comply with the

DATE	DOCKET NUMBER	PROCEEDINGS
		Court's 5 Order entered on March 26, 2010. Absent a timely response to this Order, this action shall be dismissed without prejudice. (VE) (Entered: 06/22/2010)
		* * * * *
6/30/2010	7	STATUS REPORT *Filed* by Plaintiff Peter H Arkison. (Moewes, Denice) (Entered: 06/30/2010)
7/2/2010	8	ORDER by Judge Richard A Jones. The Court DENIES 1 Motion to Withdraw the Reference. The Court DISMISSES this action. (CL) (cc: N. Pavaleda) (Entered: 07/06/2010)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON (SEATTLE)

2:10CV00929-MJP

PETER ARKISON

v.

EXECUTIVE BENEFITS INSURANCE

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/28/2010	1	TRANSMITTAL OF DOCUMENTS (Attachments: # 1 Notice of Appeal, # 2 Order Being Appealed, # 3 Election to District Court, # 4 Docket Sheet, # 5 Certificate of Mailing to Parties Not Electronically Notified) (Bankruptcy Appeals (Sea),) Bankruptcy #08-01132, Entered by Sandra Isreal and Certificat of Mailing to Parties not electronically Noticed. (Entered: 06/07/2010)
		* * * * *
10/28/2010	7	Appellant's BRIEF by Defendant/Appellant Executive

DATE	DOCKET NUMBER	PROCEEDINGS
		Benefits Insurance Agency. Appellee Response Brief due by 10/19/2010, (Teichert, Jeffrey) (Entered: 10/28/2010)
		* * * * *
11/19/2010	9	DESIGNATION OF RECORD AND STATEMENT OF ISSUES by Plaintiff/Appellee Peter H Arkison, (re: 5 Bankruptcy Certificate of Record,.) (Moewes, Denice) (Entered: 11/19/2010)
		* * * * *
11/29/2010	12	Appellee's BRIEF by Plaintiff/Appellee Peter H Arkison. Appellant Reply Brief due by 12/10/2010, (Attachments: # 1 Appendix Excerpt of Record 1-99, # 2 Appendix Excerpt of Record 100-199, # 3 Appendix Excerpt of Record 200-299, # 4 Appendix Excerpt of Record 300-399, # 5 Appendix Excerpt of Record 400-489) (Moewes, Denice) (Entered: 11/29/2010)
12/10/2010	13	Appellant's REPLY BRIEF by Defendant/Appellant Executive Benefits Insurance Agency. (Attachments: # 1

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit) (Sturdevant, James) (Entered: 12/10/2010)
		* * * * *
1/21/2011	15	ORDER On the merits, Appellant has failed to show any dispute of material fact in the record that could possibly support the reversal of the Bankruptcy Courts order. The Court DISMISSES the appeal and AFFIRMS the Bankruptcy Court re: 6 Bankruptcy Motion, by Judge Marsha J. Pechman. (MD) Modified on 1/24/2011 - cc to Nicholas Palaveda (MD). (Entered: 01/24/2011)
1/24/2011	16	JUDGMENT BY COURT THE COURT HAS ORDERED THAT the appeal is DISMISSED and the Bankruptcy Court is AFFIRMED. (MD) Modified on 1/24/2011- cc to Nicholas Palaveda (MD). (Entered: 01/24/2011)
2/18/2011	17	NOTICE OF APPEAL (11-35162) by Defendant/Appellant Executive Benefits Insurance Agency. Filing Fee $455, Receipt number

DATE	DOCKET NUMBER	PROCEEDINGS
		0981-2338111. (Sturdevant, James) Modified on 2/24/2011 (SA). (Entered: 02/18/2011)
		* * * * *
12/4/2012	20	OPINION of USCA (NOT THE MANDATE 11-35162) as to 17 Notice of Appeal filed by Executive Benefits Insurance Agency AFFIRMED. (SA) (Entered: 12/04/2012)
12/31/2012	21	MANDATE of USCA (11-35162) as to 17 Notice of Appeal filed by Executive Benefits Insurance Agency; AFFIRMED. (LMK) (Entered: 12/31/2012)
7/10/2013	22	ORDER of SUPREME COURT (12-1200) as to 17 Notice of Appeal filed by Executive Benefits Insurance Agency; The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is granted. (LMK) (Entered: 07/10/2013)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

11-35162

EXECUTIVE BENEFITS INSURANCE, APPELLANT

v.

PETER ARKISON, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/23/2011	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 03/02/2011. Appellant Executive Benefits Insurance Agency opening brief due 05/31/2011. Appellee Peter H. Arkison answering brief due 06/28/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7658010] (KM)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/19/2011	11	Submitted (ECF) Opening brief for review. Submitted by Appellant Executive Benefits Insurance Agency. Date of service: 05/19/2011. [7758072]--[COURT UPDATE: Attached Certificate of Service. Resent NDA. 05/20/2011 by TW] (NAP)
		* * * * *
5/27/2011	16	Filed Appellant Executive Benefits Insurance Agency excerpts of record in 2 volumes. Served on 05/25/2011. [7767252] (LA)
		* * * * *
7/12/2011	19	Submitted (ECF) Answering brief for review. Submitted by Appellee Peter H. Arkison. Date of service: 07/11/2011. [7816724]--[COURT UPDATE: Replaced PDF of brief (to remove duplicated cover page and tables and to include Statement of Related Cases.) Resent NDA. 07/13/2011 by DB] (DM)

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
7/19/2011	24	Filed Appellee Peter H. Arkison supplemental excerpts of record on appeal in 2 volumes. [7827446] (LA)
7/22/2011	25	Filed (ECF) Appellant Executive Benefits Insurance Agency Motion to dismiss for lack of jurisdiction. Date of service: 07/22/2011. [7829599] (NAP)
7/26/2011	26	Submitted (ECF) Reply brief for review. Submitted by Appellant Executive Benefits Insurance Agency. Date of service: 07/26/2011. [7833893] (NAP)
	* * * * *	
8/2/2011	28	Filed (ECF) Appellee Peter H. Arkison response opposing motion (,motion to dismiss for lack of jurisdiction). Date of service: 08/02/2011. [7841621] (DM)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
10/13/2001	34	ARGUED AND SUBMITTED TO ALEX KOZINSKI, RICHARD A. PAEZ and RANER C. COLLINS. [7926888] (SB)
11/4/2011	35	Filed order FOR PUBLICATION (ALEX KOZINSKI, RICHARD A. PAEZ and RANER C. COLLINS) The court invites supplemental briefs by any amicus curiae addressing the following questions: Does Stern v. Marshall, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment? Any briefs responding to this order shall be filed no later than thirty days from the filed date of this order. All briefs shall comply with the page or typevolume limitations specified in Federal Rules of Ap-

DATE	DOCKET NUMBER	PROCEEDINGS
		pellate Procedure 29(d) and 32(a)(7). Any person or entity wishing to file a brief as an amicus curiae in response to this order is granted leave to do so pursuant to Federal Rule of Appellate Procedure 29(a). [7954722] (SM)
		* * * * *
12/2/2011	38	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Alan Vanderhoff. Date of service: 12/02/2011. [7986470] (AV)
		* * * * *
1/3/2012	44	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by G. Eric Brunstad, Jr.. Date of service: 01/03/2012. [8017017] (GB)
		* * * * *
1/13/2012	48	Submitted (ECF) Amicus brief for review (by govern-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment or with consent per FRAP 29(a)). Submitted by S. Todd Brown, G. Marcus Cole, Ronald D. Rotunda, and Todd J. Zywicki. Date of service: 01/13/2012. [8031716] (CG)
		* * * * *
1/18/2012	51	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by John A.E. Pottow. Date of service: 01/18/2012. [8034613]--[COURT UPDATE: Attached corrected brief, removed Notice of Appearance. Resent NDA. 01/18/2012 by GD] (JAP)
1/18/2012	52	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Business Law Section of the Florida Bar. Date of service: 01/18/2012. [8035278]--[COURT UPDATE: Attached corrected brief. Resent NDA. 01/19/2012 by RY] (RAC)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
1/18/2012	55	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by New CH YMC Acquisition LLC; Yellowstone Mountain Club, LLC; Yellowstone Development, LLC. Date of service: 01/18/2012. [8036384]--[COURT UPDATE: Attached corrected brief and certificate of service. Resent NDA. 01/19/2012 by RY] (PDM)
1/19/2012	56	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by National Association of Bankruptcy Trustees. Date of service: 01/19/2012. [8037221] (LFR)
		* * * * *
1/19/2012	61	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Jones Day. Date of service:

DATE	DOCKET NUMBER	PROCEEDINGS
		01/19/2012. [8037616] (NG)
1/19/2012	62	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by United States of America. Date of service: 01/19/2012. [8037652] (SVD)
		* * * * *
1/19/2012	70	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by MARCIA M. TINGLEY. Date of service: 01/19/2012. [8037800] (DH)
1/19/2012	71	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Timothy L. Blixseth. Date of service: 01/19/2011. [8037806]--[COURT UPDATE: Attached Certificate of Service. Resent NDA. 01/20/2012 by GD] (CC)
1/19/2012	72	Submitted (ECF) Amicus brief for review (by govern-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment or with consent per FRAP 29(a)). Submitted by Alejandro Diaz-Barba Martha Barba De La Torre. Date of service: 01/19/2012. [8037875] (ES)
		* * * * *
1/19/2012	76	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Concerned Chapter 7 & 11 Trustees and Plan Administrators. Date of service: 01/19/2012. [8038267]– [COURT UPDATE: Attached Certificate of Service. Resent NDA. 01/20/2012 by DB.]– [COURT UPDATE: Replaced PDF of brief (formatting error has been corrected). Resent NDA. 01/20/2012 by DB] (CDS)
		* * * * *
12/4/2012	93	FILED OPINION (ALEX KOZINSKI, RICHARD A. PAEZ and RANER C. COLLINS) AFFIRMED. Judge: RAP Authoring,. FILED

DATE	DOCKET NUMBER	PROCEEDINGS
		AND ENTERED JUDGMENT. [8423961] (DD)
12/31/2012	94	MANDATE ISSUED. (AK, RAP and RCC) [8456203] (TB
		* * * * *
5/2/2013	97	Received notice from the Supreme Court: petition for certiorari filed on 04/03/2013. Supreme Court Number 12-1200. [8613953] (RR)
7/10/2013	98	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/24/2013. Supreme Court Number 12-1200. [8697846] (RR)

Judge Thomas
T. Glover
Chapter 7

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Bankruptcy No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. _____

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A Washington Corporation, and A.R.I.S. Inc., A Washington Corporation, and NICHOLAS PALAVEDA and MAJORIE EWING, Husband and wife and the marital community composed thereof, and PETER PEARCE and JANE DOE PEARCE, husband and wife, and the marital community composed thereof, Defendants

COMPLAINT TO AVOID PREFERENTIAL TRANSFERS, FRAUDULENT TRANSFER, FOR FINDING OF SUCCESSOR LIABILITY, FOR EQUITABLE SUBORDINATION OF CLAIMS, FOR CONVERSION, FOR ACCOUNTING, FOR SUBSTANTIVE CONSOLIDATION AND FOR BREACH OF FIDUCIARY DUTY

I. INTRODUCTION

PETER ARKISON, solely in his capacity as Chapter 7 Trustee of the bankruptcy estate of Bellingham Insurance Agency, by and through his attorneys, Wood & Jones, P.S., seeks to avoid the transfer of all of the assets of Bellingham Insurance Agency, or the value thereof, which were transferred to Executive Benefits Insurance Agency, A.R.I.S. Inc., Nicholas Palaveda and Marjorie Ewing, and Peter and Jane Doe Pearce both individually and their marital community, on the basis that the transfers were preferential and fraudulent in nature and these defendants should be found to have successor liability as a result of the transfers. The Trustee further seeks to avoid transfers of funds and assets from the Debtor to ARIS and EBIA, Ewing, Palaveda, and Peter and Jane Doe Pearce, to subordinate the claims of the Defendants, for an order substantively consolidating ARIS and EBIA into this bankruptcy proceeding, for an accounting and finding the Palaveda, Ewing and Pearce violated their fiduciary duties.

II. JURISDICTION AND VENUE

2.1 This is an action to recover estate property by avoiding preferential transfers, fraudulent transfers, imposing successor liability, equitably subordinating the claims of ARIS, EBIA, Palaveda, Ewing and Pearce, for conversion, for an accounting, for substantive consolidation and for breach of fiduciary duty and thus is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(B), (C), (E), (F), (H), and (O).

2.2 This Court has jurisdiction to hear this complaint pursuant to 28 U.S.C. §157(a) and (b), 1334(a) and (b), and 11 U.S.C. §§105, 510, 544, 547, 548, 550 and 551.

2.3 This matter has been referred to the Bankruptcy Judges of the District pursuant to General Rule 7 of the Rules for the United States District Court for the Western District of Washington.

2.4 Venue is proper under 28 U.S.C. §1409.

III. PARTIES

3.1 Debtor. Bellingham Insurance Agency, Inc., ("BIA" or "Debtor") filed a voluntary chapter 7 petition on June 1, 2006.

3.2 Trustee. Peter Arkison ("Arkison" or "Trustee") was appointed Chapter 7 Trustee for the BIA estate on or about June 1, 2006. The Trustee is authorized to bring this action pursuant to §§ 105, 510, 544, 547, 548, 550 and 551 of the Bankruptcy Code and does so solely in his capacity as Trustee for the BIA estate.

3.3 Defendant EBIA. Upon information and belief Executive Benefits Insurance Agency ("EBIA") was incorporated in the State of Washington on March 6, 2006 and has conducted business in the State of Washington since that date.

3.4 Defendant A.R.I.S. Upon information and belief A.R.I.S., Inc. ("ARIS") was incorporated in the State of Washington on September 11, 2003. A.R.I.S. has been conducting business in the State of Washington since September 11, 2003.

3.5 Defendants Peter and Jane Doe Pearce. Upon information and belief the Trustee alleges that Peter Pearce and Jane Doe Pearce ("Pearce") are husband and wife and form a marital community and any acts done by one was done for the benefit of

the community. Peter and Jane Doe Pearce are residents of the State of Washington.

3.6 Defendants Nicholas Palaveda and Marjorie Ewing. Upon information and belief the trustee alleges that Nicholas Palaveda and Marjorie Ewing are husband and wife and form a marital community and any acts done by one was done for the benefit of the community. Nicholas Palaveda and Marjorie Ewing are residents of the State of Washington.

IV. STATEMENT OF FACTS

4.1 BIA was involved in the insurance business and had a niche in 412(i) plans. 412(i) plans are a creation of Section 412(i) of the Internal Revenue Code. In short, the code allows these defined benefit plans to be funded by insurance products – very high premium policies that only high-end earners (who have a business) can utilize. Often this means doctors, dentists, lawyers and the like.

4.2 BIA also used the name of 412(i) Company during its operations

4.3 412(i) is not incorporated in any state and is nothing more than a dba or trade name of BIA.

4.4 Nicholas Palaveda ("Palaveda") and Marjorie Ewing ("Ewing") are husband and wife and are the majority owners of BIA.

4.5 BIA filed a voluntary chapter 7 bankruptcy petition on June 1, 2006 ("Petition Date").

FACTS RELATING TO ARIS

4.6 ARIS was incorporated in the State of Washington on September 11, 2003 and is a related

company in that Palaveda and Ewing are the sole or majority owners of ARIS.

4.7 Upon information and belief the Trustee alleges that ARIS is an insider of the debtor.

4.8 Alternatively, the Trustee alleges that ARIS and BIA are a single entity in that ARIS reports on BIA's tax returns.

4.9 Palaveda was the sole director of BIA from its inception through February 14, 2006. On February 14, 2006 Palaveda resigned his position and was replaced by Ewing as sole director of BIA.

4.10 Up until March of 2006 ARIS and BIA shared the same office, located at 4164 Meridian Street, #400, Bellevue, Washington.

4.11 Up until approximately March 6, 2006, all the accounting for BIA and ARIS was maintained under one set of files with Quickbooks.

4.12 Up until at least January 1, 2006 separate bank accounts were maintained by BIA and ARIS but BIA acted as the paymaster for ARIS.

4.13 ARIS employees and expenses were maintained as BIA employees and expenses which were to be reimbursed by ARIS to BIA.

4.14 On occasion ARIS transferred money to BIA, allegedly as reimbursement for the expenses, which were accounted for via an intercompany account.

4.15 Upon information and belief the Trustee alleges that ARIS did not file corporate income tax returns for 2003, 2004 and 2005. Instead ARIS was reported with the BIA tax return.

4.16 There are two components to the BIA business the sale of the insurance plan and the plan design. Upon information and belief until mid 2006 there were no invoices from ARIS to BIA for either plan design or for sales of the insurance plan.

4.17 BIA printouts in support of its corporate income tax returns for 2004 and 2005 have no recordings of intercompany account balances due ARIS. The printouts are dated May 9, 2006.

4.18 ARIS printouts in support of its corporate income tax return for 2005, which were printed on January 30, 2006, have no indication of an intercompany receivable to from BIA. This return was prepared on September 15, 2006.

4.19 Since the preparation and filing of the tax returns the BIA books have been altered/recast to now show a $1,553,306.01 debt owing from BIA to ARIS. These entries were altered/recast sometime after September 15, 2006.

4.20 Upon information and belief the Trustee alleges that the records were altered/recast to charge BIA for plan designs on a monthly basis since August 31, 2003 to December 31, 2005. The amount that was billed each month by ARIS to BIA for the plan design in the altered/recast figures varies each month between $5,520 to $74,275 for expenses.

4.21 Upon information and belief the Trustee alleges that the records were altered/recast to charge BIA through an intercompany account, monthly charges ranging from $30,591 to $40,137 per month from August 31, 2003 to December 31, 2006.

4.22 For the time period covering 2006 the altered/recast charges show that the $40,137 that ARIS was billing to BIA was broken down as occupancy and administrative expenses of $15,274 and payroll and benefits of $24,863.00.

4.23 Someone in their haste to restate the financial records forgot that BIA was the paymaster from August 3, 2003 December 31, 2005. Thus these altered/recast charges are not valid.

4.24 BIA paid the January, 2006 payroll and related expenses as well as rent for the months of January, February and March, 2006, yet ARIS is claiming that BIA owes it for the January, 2006 payroll and the January, February and March, 2006 rent.

4.25 On February 15, 2006 BIA transferred to ARIS $65,590.00.

4.26 On February 15, 2006 BIA transferred to ARIS $4,850.00

4.27 On March 30, 2006 BIA transferred to ARIS $46,165.16.

4.28 Upon information and belief the Trustee alleges that within a few months of the Petition Date BIA transferred to ARIS all or part of its assets, including funds, accounts receivable, ongoing business, book of business, work in progress, phone number, office space, computer system, employees and all other indicia of business.

4.29 Upon information and belief the trustee alleges that funds the belong to BIA representing commissions, payments for plan designs, and for other services rendered have been converted by ARIS in

that said funds were deposited into the ARIS account when in fact said funds belong to BIA.

4.30 Upon information and belief the Trustee alleges that ARIS is a nothing more than a mere continuation of BIA's business and is a successor of BIA.

FACTS RELATING TO EBIA

4.31 EBIA was incorporated on March 6, 2006 in the State of Washington. EBIA has been conducting business in the State of Washington since that date.

4.32 Upon information and belief the Trustee alleges that EBIA is solely owned by Ewing and Palaveda.

4.33 On February 14, 2006, Ewing, as sole director of EBIA, opened a bank account for EBIA at Bank of America.

4.34 On February 14, 2006 BIA assigned all of its agency commissions to Pearce.

4.35 From February 14, 2006 forward all commissions owing to BIA were paid instead to Pearce who in turn had all commissions deposited into either the ARIS bank account or the EBIA account.

4.36 Upon information and belief the Trustee alleges that within a few months of the Petition Date BIA transferred to EBIA all or part of its assets, including funds, accounts receivable, ongoing business, book of business, work in progress, phone number, office space, computer system, employees and all other indicia of business.

4.37 Upon information and belief the trustee alleges that funds that belong to BIA representing commissions, payments for plan designs, and for other services have been converted by EBIA in that they were deposited into the EBIA account when in fact said funds belong to BIA.

4.38 Upon information and belief the Trustee alleges that there may be other transfers made to EBIA that belong to BIA.

4.39 Upon information and belief the Trustee alleges that EBIA is a nothing more than a mere continuation of BIA's business and is a successor of BIA.

FACTS RELATING TO STATE COURT LAWSUIT AND RESTRAINING ORDER

4.40 Between October 31, and November 4, 2005, an Arbitration proceeding was held relating to claims between Paul Hess ("Hess"), Glenn Price ("Price") and Charles Farrington ("Farrington") (collectively the "Arbitration Defendants") and ARIS, BIA, Ewing, Palaveda and Pearce (Collectively "Arbitration Plaintiffs") arising out of the former business relationship between the Arbitration Plaintiffs and the Arbitration Defendants.

4.41 On November 21, 2005 Arbitrator Scott B. Easter ("Arbitrator") issued an Interim Award that exonerated the Arbitration Defendants of the Arbitration Plaintiffs allegations and claims. The Arbitrator further ruled that the Arbitrator Defendants met their burden of proof that they were entitled to indemnification as officers and directors and accordingly, were entitled to an award of "reasonable expens-

es" pursuant to RCW 23B.08.520. as well as all expenses and liabilities including counsel fees, reasonably incurred pursuant to the corporations bylaws.

4.42 On January 3, 2006, the Arbitrator issues his Final Reasoned Award that incorporated the Interim Award by reference and that awarded the Arbitration Defendants attorney's fees and expenses for a net award of $90,021.92 with a corresponding judgment.

4.43 The Arbitration Plaintiffs filed a motion to vacate the arbitration award. On February 17, 2006 the Court denied the motion to vacate the arbitration award.

4.44 On March 6, 2006 the Court entered a written Order denying the motion to vacate and amending the judgment to provide an award of attorneys fees to the Arbitration Defendants for fees incurred in responding to the motion to vacate. The judgment was increased from $90,012.92 to $104,212.42.

4.45 On or about March 14, 2006 the Arbitration Plaintiffs appealed the denial of its motion to vacate, but did not post a supersedeas bond.

4.46 Sometime over the next several weeks the Arbitration Defendants learned of the facts that BIA had ceased doing business and that a company known as EBIA and ARIS had basically taken over for the Arbitration Plaintiffs. On or about June 1, 2006 the Arbitration Defendants filed a Complaint for Fraudulent Transfer in Whatcom County Superior Court which was assigned case no. 06-2-01256-5 complaining that the assets of BIA had been transferred to ARIS and EBIA.

4.47 BIA filed its voluntary chapter 7 bankruptcy petition on June 1, 2006.

FACTS RELATING TO PEARCE

4.48 On February 14, 2006 BIA assigned all of its agency commissions to Pearce.

4.49 BIA did not receive reasonably equivalent value in exchange for the assignment to Pearce of all of its commissions.

4.50 From February 14, 2006 forward all commissions owing to BIA were paid instead to Pearce who in turn had all commissions deposited into either the ARIS bank account or the EBIA account.

4.51 The amount that Pearce has transferred is at least $122,000.

4.52 Upon information and belief the Trustee alleges that Pearce has converted funds that belong to BIA for his own purpose.

4.53 The irrevocable assignments entered into between BIA and Pearce were fraudulent in that they were made with actual intent to hinder, delay and defraud creditors to whom BIA was indebted.

4.54 Upon information and belief the Trustee alleges that Pearce has received funds from EBIA, ARIS and other entities which funds properly belong to BIA.

FACTS RELATING TO PALAVEDA AND EWING

4.55 In April or May of 2006, and while a restraining order was in effect, Palaveda sued BIA for unpaid back wages he contended were owed to him.

4.56 Apparently, his wife, Ewing, who was the sole director at the time, determined not to respond to the lawsuit and instead a stipulated judgment was entered on May 19, 2006 which awarded Palaveda a judgment in the amount of $226,781.00, which included pre-petition interest in the amount of $32,117.

4.57 Palaveda and Ewing are insiders of the debtor.

4.58 Palaveda and Ewing received substantial transfers from BIA for which BIA did not receive reasonably equivalent value.

4.59 Palaveda and Ewing caused ARIS and BIA, using BIA funds to make numerous transfer to or for the benefit of Palaveda and Ewing.

V. FIRST CAUSE OF ACTION: PREFERENTIAL TRANSFERS §547 OF THE CODE – AS TO DEFENDANT ARIS

5.1 Paragraphs I-IV, and all subsections thereof, are hereby repeated and incorporated as though fully set forth herein.

5.2 The payments by the Debtor to Defendant ARIS constitute a transfer by the Debtor of an interest in property.

5.3 The transfers from the Debtor to Defendant ARIS were made for or on account of an antecedent debt owed by the Debtor to Defendants ARIS.

5.4 The transfers referred to in Paragraph IV, above, were made by the Debtor to Defendant ARIS on or within one year of the date the bankruptcy petition was filed and were to insiders of the debtor.

5.5 At the time of the transfers referred to in Paragraph IV, above, the Debtor was insolvent.

5.6 The transfers referred to in Paragraph IV, above, enabled Defendant ARIS to receive more than it would have received if the case were a case under Chapter 7 of Title 11 of the United States Code, the transfers had not been made, and the Defendant ARIS received payment of its debt to the extent provided by the provisions of Title 11 of the United States Code.

VI. SECOND CAUSE OF ACTION: PREFERENTIAL TRANSFERS – §547 OF THE CODE – AS TO DEFENDANT EBIA

6.1 Paragraphs I-V, and all subsections thereof, are hereby repeated and incorporated as though fully set forth herein.

6.2 The payments by the Debtor to Defendant EBIA constitute a transfer by the Debtor of an interest in property.

6.3 The transfers from the Debtor to Defendant EBIA were made for or on account of an antecedent debt owed by the Debtor to Defendants EBIA.

6.4 The transfers referred to in Paragraph IV, above, were made by the Debtor to Defendant EBIA on or within one year of the date the bankruptcy petition was filed and were to insiders of the debtor.

6.5 At the time of the transfers referred to in Paragraph IV, above, the Debtor was insolvent.

6.6 The transfers referred to in Paragraph IV, above, enabled Defendant EBIA to receive more than it would have received if the case were a case under Chapter 7 of Title 11 of the United States Code, the

transfers had not been made, and the Defendant EBIA received payment of its debt to the extent provided by the provisions of Title 11 of the United States Code.

VII. THIRD CAUSE OF ACTION: PREFERENTIAL TRANSFERS - §547 OF THE CODE AS TO DEFENDANTS EWING AND PALAVEDA

7.1 Paragraphs I-VI, and all subsections thereof, are hereby repeated and incorporated as though fully set forth herein.

7.2 The payments by the Debtor to Defendants Palaveda and Ewing constitute a transfer by the Debtor of an interest in property.

7.3 The transfers from the Debtor to Defendants Palaveda and Ewing were made for or on account of an antecedent debt owed by the Debtor to Defendants Palaveda and Ewing.

7.4 The transfers referred to in Paragraph IV, above, were made by the Debtor to Defendants Palaveda and Ewing on or within one year of the date the bankruptcy petition was filed and were to insiders of the debtor.

7.5 At the time of the transfers referred to in Paragraph IV, above, the Debtor was insolvent.

7.6 The transfers referred to in Paragraph IV, above, enabled Defendants Palaveda and Ewing to receive more than they would have received if the case were a case under Chapter 7 of Title 11 of the United States Code, the transfers had not been made, and Defendants Palaveda and Ewing received payment of

their debts to the extent provided by the provisions of Title 11 of the United States Code.

VIII. FOURTH CAUSE OF ACTION: PREFERENTIAL TRANSFERS - §547 OF THE CODE AS TO DEFENDANTS PEARCE

8.1 Paragraphs 1-VII, and all subsections thereof, are hereby repeated and incorporated as though fully set forth herein.

8.2 The payments by the Debtor to Defendants Pearce constitute a transfer by the Debtor of an interest in property.

8.3 The transfers from the Debtor to Defendants Pearce were made for or on account of an antecedent debt owed by the Debtor to Defendants Pearce.

8.4 The transfers referred to in Paragraph IV, above, were made by the Debtor to Defendants Pearce on or within one year of the date the bankruptcy petition was filed and were to insiders of the debtor.

8.5 At the time of the transfers referred to in Paragraph IV, above, the Debtor was insolvent.

8.6 The transfers referred to in Paragraph IV, above, enabled Defendants Pearce to receive more than they would have received if the case were a case under Chapter 7 of Title 11 of the United States Code, the transfers had not been made, and Defendants Palaveda and Ewing received payment of their debts to the extent provided by the provisions of Title 11 of the United States Code.

IX. FIFTH CAUSE OF ACTION FRAUDULENT TRANSFERS §548 OF THE CODE AS TO DEFENDANT ARIS

9.1 Paragraphs I through VIII and all subsections thereof are hereby repeated and incorporated as though set forth herein.

9.2 Within one year of filing the bankruptcy petition herein, and while the Debtor was insolvent, the Debtor made those transfers set forth in paragraph IV above to or for the benefit of Defendant ARIS.

9.3 The Debtor did not receive reasonably equivalent value for the transfers set forth in paragraph IV above which were made to or for the benefit of Defendant ARIS.

9.4 The Debtor was insolvent on the date of the transfers referenced in paragraph IV above. Alternatively, the Debtor became insolvent as a result such transfers to Defendant ARIS.

9.5 The Debtor made the transfers referred to in paragraph IV above to Defendant ARIS with actual intent to hinder, delay and defraud creditors to whom the Debtor was indebted on or after the date of the transfers.

9.6 The transfers to Defendant ARIS set forth in paragraph IV are avoidable pursuant to 11 U.S.C. §548 as stated therein as they were a) made with actual intent to hinder, delay or defraud creditors to whom the Debtor was indebted on or after the date of the transfers; or b) the Debtor received less than reasonable equivalent value in exchange for the transfers, became insolvent or was insolvent at the time of the transfers, leaving the Debtor with an unreasonably

low capital account or leaving the Debtor unable to pay its debts as they matured.

9.7 The transfers made to Defendant ARIS as set forth in paragraph IV above are avoidable by the Trustee under 11 U.S.C. §548(a)(1) and/or (a)(2).

X. SIXTH CAUSE OF ACTION: FRAUDULENT TRANSFERS §548 OF THE CODE AS TO DEFENDANT EBIA

10.1 Paragraphs I through IX and all subsections thereof are hereby repeated and incorporated as though set forth herein.

10.2 Within one year of filing the bankruptcy petition herein, and while the Debtor was insolvent, the Debtor made those transfers set forth in paragraph IV above to or for the benefit of Defendant EBIA.

10.3 The Debtor did not receive reasonably equivalent value for the transfers set forth in paragraph IV above which were made to or for the benefit of Defendant EBIA.

10.4 The Debtor was insolvent on the date of the transfers referenced in paragraph IV above. Alternatively, the Debtor became insolvent as a result such transfers to Defendant EBIA.

10.5 The Debtor made the transfers referred to in paragraph IV above to Defendant EBIA with actual intent to hinder, delay and defraud creditors to whom the Debtor was indebted on or after the date of the transfers.

10.6 The transfers to Defendant EBIA set forth in paragraph IV are avoidable pursuant to 11 U.S.C. §548 as stated therein as they were a) made

with actual intent to hinder, delay or defraud creditors to whom the Debtor was indebted on or after the date of the transfers; or b) the Debtor received less than reasonable equivalent value in exchange for the transfers, became insolvent or was insolvent at the time of the transfers, leaving the Debtor with an unreasonably low capital account or leaving the Debtor unable to pay its debts as they matured.

10.7 The transfers made to Defendant EBIA as set forth in paragraph IV above are avoidable by the Trustee under 11 U.S.C. §548(a)(1) and/or (a)(2).

XI. SEVENTH CAUSE OF ACTION: FRAUDULENT TRANSFERS §548 OF THE CODE AS TO DEFENDANTS PALAVEDA AND EWING

11.1 Paragraphs I through X and all subsections thereof are hereby repeated and incorporated as though set forth herein.

11.2 Within one year of filing the bankruptcy petition herein, and while the Debtor was insolvent, the Debtor made those transfers set forth in paragraph IV above to or for the benefit of Defendants Palaveda and Ewing.

11.3 The Debtor did not receive reasonably equivalent value for the transfers set forth in paragraph IV above which were made to or for the benefit of Defendants Palaveda and Ewing.

11.4 The Debtor was insolvent on the date of the transfers referenced in paragraph IV above. Alternatively, the Debtor became insolvent as a result such transfers to Defendants Palaveda and Ewing.

11.5 The Debtor made the transfers referred to in paragraph IV above to Defendants Palaveda and Ewing with actual intent to hinder, delay and defraud creditors to whom the Debtor was indebted on or after the date of the transfers.

11.6 The transfers to Defendants Palaveda and Ewing set forth in paragraph IV are avoidable pursuant to 11 U.S.C. §548 as stated therein as they were a) made with actual intent to hinder, delay or defraud creditors to whom the Debtor was indebted on or after the date of the transfers; or b) the Debtor received less than reasonable equivalent value in exchange for the transfers, became insolvent or was insolvent at the time of the transfers, leaving the Debtor with an unreasonably low capital account or leaving the Debtor unable to pay its debts as they matured.

11.7 The transfers made to Defendants Palaveda and Ewing as set forth in paragraph IV above are avoidable by the Trustee under 11 U.S.C. §548(a)(1) and/or (a)(2).

XII. EIGHTH CAUSE OF ACTION: FRAUDULENT TRANSFERS §548 OF THE CODE AS TO DEFENDANT PEARCE

12.1 Paragraphs I through XI and all subsections thereof are hereby repeated and incorporated as though set forth herein.

12.2 Within one year of filing the bankruptcy petition herein, and while the Debtor was insolvent, the Debtor made those transfers set forth in paragraph IV above to or for the benefit of Defendants Pearce.

12.3 The Debtor did not receive reasonably equivalent value for the transfers set forth in para-

graph IV above which were made to or for the benefit of Defendants Pearce.

12.4 The Debtor was insolvent on the date of the transfers referenced in paragraph IV above. Alternatively, the Debtor became insolvent as a result such transfers to Defendants Pearce.

12.5 The Debtor made the transfers referred to in paragraph IV above to Defendants Pearce with actual intent to hinder, delay and defraud creditors to whom the Debtor was indebted on or after the date of the transfers.

12.6 The transfers to Defendants Pearce set forth in paragraph IV are avoidable pursuant to 11 U.S.C. §548 as stated therein as they were a) made with actual intent to hinder, delay or defraud creditors to whom the Debtor was indebted on or after the date of the transfers; or b) the Debtor received less than reasonable equivalent value in exchange for the transfers, became insolvent or was insolvent at the time of the transfers, leaving the Debtor with an unreasonably low capital account or leaving the Debtor unable to pay its debts as they matured.

12.7 The transfers made to Defendants Pearce as set forth in paragraph IV above are avoidable by the Trustee under 11 U.S.C. §548(a)(1) and/or (a)(2).

XIII. NINTH CAUSE OF ACTION – FRAUDULENT CONVEYANCES 11 U.S.C. § 544 AND RCW 19.40. TO DEFENDANT ARIS

13.1 Paragraphs I through XII and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

13.2 The Debtor made the transfers set forth in paragraph IV above which are avoidable pursuant to RCW 19.40.010 et. seq. as stated therein.

13.3 The transfers by the Debtor to Defendant ARIS as set forth in paragraph IV above were made with actual intent to hinder, delay or defraud creditors of the Debtor.

13.4 The transfers by the Debtor to Defendant ARIS as set forth in paragraph IV were made without the Debtor receiving reasonably equivalent value in exchange for the transfers.

13.5 The transfers by the Debtor to Defendant ARIS as set forth in paragraph IV above caused the Debtor to engage or thereafter engage in business for which the remaining assets of the Debtor were unreasonably small in relation to the business or transactions.

13.6 The transfers by the Debtor to Defendant ARIS should have caused the Debtor to believe that it would incur debts beyond its ability to pay as they became due.

13.7 The transfers by the Debtor to Defendant ARIS as set forth in paragraph IV above were not made in exchange for reasonably equivalent value.

13.8 The Debtor was insolvent on the date of each and every transfer set forth in paragraph IV above. Alternatively, the Debtor became insolvent as a result of the transfers.

XIV. TENTH CAUSE OF ACTION – FRAUDULENT CONVEYANCES 11 U.S.C. § 544 AND RCW 19.40. TO DEFENDANT EBIA

14.1 Paragraphs I through XIII and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

14.2 The Debtor made the transfers set forth in paragraph IV above which are avoidable pursuant to RCW 19.40.010 et. seq. as stated therein.

14.3 The transfers by the Debtor to Defendant EBIA as set forth in paragraph IV above were made with actual intent to hinder, delay or defraud creditors of the Debtor.

14.4 The transfers by the Debtor to Defendant EBIA as set forth in paragraph IV were made without the Debtor receiving reasonably equivalent value in exchange for the transfers.

14.5 The transfers by the Debtor to Defendant EBIA as set forth in paragraph IV above caused the Debtor to engage or thereafter engage in business for which the remaining assets of the Debtor were unreasonably small in relation to the business or transactions.

14.6 The transfers by the Debtor to Defendant EBIA should have caused the Debtor to believe that it would incur debts beyond its ability to pay as they became due.

14.7 The transfers by the Debtor to Defendant EBIA as set forth in paragraph IV above were not made in exchange for reasonably equivalent value.

14.8 The Debtor was insolvent on the date of each and every transfer set forth in paragraph IV above. Alternatively, the Debtor became insolvent as a result of the transfers.

XV. ELEVENTH CAUSE OF ACTION – FRAUDULENT CONVEYANCES 11 U.S.C. § 544 AND RCW 19.40. TO DEFENDANTS PALAVEDA AND EWING

15.1 Paragraphs I through XIV and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

15.2 The Debtor made the transfers set forth in paragraph IV above which are avoidable pursuant to RCW 19.40.010 et. seq. as stated therein.

15.3 The transfers by the Debtor to Defendant Palaveda and Ewing as set forth in paragraph IV above were made with actual intent to hinder, delay or defraud creditors of the Debtor.

15.4 The transfers by the Debtor to Defendants Palaveda and Ewing as set forth in paragraph IV were made without the Debtor receiving reasonably equivalent value in exchange for the transfers.

15.5 The transfers by the Debtor to Defendants Palaveda and Ewing as set forth in paragraph IV above caused the Debtor to engage or thereafter engage in business for which the remaining assets of the Debtor were unreasonably small in relation to the business or transactions.

15.6 The transfers by the Debtor to Defendants Palaveda and Ewing should have caused the

Debtor to believe that it would incur debts beyond its ability to pay as they became due.

15.7 The transfers by the Debtor to Defendants Palaveda and Ewing as set forth in paragraph IV above were not made in exchange for reasonably equivalent value.

15.8 The Debtor was insolvent on the date of each and every transfer set forth in paragraph IV above. Alternatively, the Debtor became insolvent as a result of the transfers.

XVI. TWELFTH CAUSE OF ACTION – FRAUDULENT CONVEYANCES 11 U.S.C. § 544 AND RCW 19.40. TO DEFENDANTS PEARCE

16.1 Paragraphs I through XV and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

16.2 The Debtor made the transfers set forth in paragraph IV above which are avoidable pursuant to RCW 19.40.010 et. seq. as stated therein.

16.3 The transfers by the Debtor to Defendants Pearce as set forth in paragraph IV above were made with actual intent to hinder, delay or defraud creditors of the Debtor.

16.4 The transfers by the Debtor to Defendants Pearce as set forth in paragraph IV were made without the Debtor receiving reasonably equivalent value in exchange for the transfers.

16.5 The transfers by the Debtor to Defendants Pearce as set forth in paragraph IV above caused the Debtor to engage or thereafter engage in business for which the remaining assets of the Debtor

were unreasonably small in relation to the business or transactions.

16.6 The transfers by the Debtor to Defendants Pearce should have caused the Debtor to believe that it would incur debts beyond its ability to pay as they became due.

16.7 The transfers by the Debtor to Defendants Pearce as set forth in paragraph IV above were not made in exchange for reasonably equivalent value.

16.8 The Debtor was insolvent on the date of each and every transfer set forth in paragraph IV above. Alternatively, the Debtor became insolvent as a result of the transfers.

XVII. THIRTEENTH CAUSE OF ACTION: SUCCESSOR LIABILITY AS TO DEFENDANTS ARIS, EBIA, PALAVEDA EWING AND PEARCE

17.1 Paragraphs I through XVI above and all subsections thereof are hereby repeated and incorporated as though fully set forth herein

17.2 Defendants ARIS, EBIA, Palaveda and Ewing are liable to the Plaintiff under the doctrine of successor liability because (1) the Defendants expressly or impliedly agreed to assume such liability; (2) the Defendants assumption of BIA's business is a de facto merger or consolidation; (3) EBIA and ARIS are mere continuations of BIA; and/or (4) EBIA was created by the Defendants for the fraudulent purpose of escaping the liabilities BIA had and avoiding the taking of BIA's assets.

17.3 The Plaintiff is entitled to judgment against each of the Defendants for the value of the BIA business and its assets on the date it was transferred.

XVIII. FOURTEENTH CAUSE OF ACTION: EQUITABLE SUBORDINATION OF CLAIMS OF DEFENDANTS ARIS, EBIA, PALAVEDA, EWING AND PEARCE

18.1 The Trustee realleges and incorporates by this reference the allegations set forth in paragraphs I through XVII.

18.2 All claims of any nature, either pre or post-petition by Defendants ARIS, EBIA, Palaveda, Ewing and Pearce against the Debtor should be subordinated to the legitimate debts owed to general unsecured creditors pursuant to 11 USC §510(c) and general equitable principals.

XIX. FIFTEENTH CAUSE OF ACTION: CONVERSION

19.1 The Trustee realleges and incorporates by this reference the allegations set forth in paragraphs I through XVIII.

19.2 Defendants ARIS, EBIA, Palaveda, Ewing and Pearce converted to their own use assets of BIA and the Bankruptcy estate, all of which belonged to the BIA estate.

19.3 Defendants ARIS, EBIA, Palaveda, Ewing and Pearce's actions were without lawful justification, willfully interfered with the property interest of the estate and have deprived the estate of possession of its property interests.

19.4 As a result of Defendants ARIS, EBIA, Palaveda, Ewing and Pearce's actions the BIA estate has suffered damages in an amount to be proven at trial.

XX. SIXTEENTH CAUSE OF ACTION: ACCOUNTING

20.1 Paragraphs I through XIX and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

20.2 The Plaintiff Trustee is entitled to an accounting to determine what, if any funds belong to the debtor and have been diverted for the use and benefit of Defendants ARIS, EBIA, Palaveda, Ewing and Pearce.

XXI. SEVENTEENTH CAUSE OF ACTION: SUBSTANTIVE CONSOLIDATION

21.1 Paragraphs I through XX and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

21.2 Non-debtor's BIA and ARIS should consolidate into the BIA case pursuant to the case of In re Bonham, 229 F.3d 750 (9th Cir. 2000).

XXII. EIGHTEENTH CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY

22.1 The Trustee realleges and incorporates by this reference the allegations set forth in paragraphs I through XXI.

22.2 The distributions and transfers set forth in paragraph IV above to Defendants ARIS, EBIA Palaveda, Ewing and Pearce were unlawful, in violation of RCW 23B.06.400, and thus constituted a

breach of Defendants Palaveda, Ewing and Pearce's fiduciary duties owed to the Debtor and its creditors as the Debtor did not receive reasonably equivalent value in exchange for those transfers.

22.3 Defendants Palaveda, Ewing and Pearce failed to discharge their duties to the Debtor in good faith, failed to exercise ordinary prudence, and acted contrary to the best interests of the Debtor.

22.4 Defendants Palaveda, Ewing and Pearce consented to and accepted unlawful transfers and distributions from the Debtor and thus Defendants Palaveda, Ewing and Pearce are personally liable to the Debtor pursuant to RCW 23B.08.310.

XXIII. EIGHTEENTH CAUSE OF ACTION: PRESERVATION OF AVOIDED TRANSFERS

23.1 Paragraphs I through XXI above and all subsections thereof are hereby repeated and incorporated as though fully set forth herein.

23.2 Any and all transfers avoided under the claims for relief set forth in Paragraphs I-XXI, above, are preserved for the benefit of the estate pursuant to 11 U.S.C. §§ 550 and 551.

XXIV. PRAYER FOR RELIEF

24.1 The Trustee asks for the following relief:

24.2 That the Court determine the transfers of funds by the Debtor to defendants ARIS, EBIA, Palaveda, Ewing and Pearce as set forth in Paragraph IV, above, constitute preferential transfers pursuant to 11 U.S.C. §§547 and 550.

24.3 That the Court determine the transfers of funds by the Debtor to Defendants ARIS, EBIA, Palaveda, Ewing, and Pearce as set forth in Paragraph IV, above, constitute fraudulent transfers pursuant to 11 U.S.C. §548.

24.4 That the Court determine the transfers of funds by the Debtor to Defendant ARIS, EBIA, Palaveda, Ewing and Pearce as set forth in Paragraph IV, above, constitute fraudulent transfers pursuant to 11 U.S.C. §544 and RCW 19.40 et.

24.5 That the Court determine that ARIS and EBIA were mere continuations of the debtor and find successor liability to be imposed against Defendants ARIS, EBIA, Palaveda, Ewing and Pearce.

24.6 That the Court determine that any and all claims of ARIS, EBIA, Palaveda, Ewing and Pearce should be equitable subordinated below those of general unsecured creditors.

24.7 That the Court determine that Defendants ARIS, EBIA, Palaveda, Ewing and Pearce converted assets of the debtor and are liable to the Trustee for the amount of the assets converted.

24.8 That the Court determine that Defendants ARIS, EBIA, Palaveda, Ewing and Pearce will be required to produce records and account for all funds received by them or for their benefit.

24.9 That the Court determine that non-debtors ARIS and EBIA should be substantively consolidated with the BIA bankruptcy estate.

24.10 That the Court find that Defendants Palaveda, Ewing and Pearce breached their fiduciary

obligations owed to the debtor and as such are personally liable for all damages arising from the breach of the fiduciary obligation.

24.11 That all transfers avoided be preserved for the benefit of the estate pursuant to §§550 & 551.

24.12 That the Court enter an order consistent with this Complaint and a judgment in an amount to be determined against Defendants ARIS, EBIA, Palaveda, Ewing and Pearce in favor of the Chapter 7 Trustee, Peter Arkison, plus interest from the date of the transfers, and such other relief as this Court deems just and proper.

Dated this 31st day of May, 2008.

WOOD & JONES, P.S.

/s/ Denice E. Moewes

Denice E. Moewes, WSB #19464
Attorney for Trustee
Peter Arkison

Judge Thomas
T. Glover
Chapter 7

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Bankruptcy No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

PETER ARKISON, TRUSTEE,, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A Washington Corporation, and A.R.I.S. Inc., A Washington Corporation, and NICHOLAS PALAVEDA and MAJORIE EWING, husband and wife and the marital community composed thereof, and PETER PEARCE and JANE DOE PEARCE, husband and wife, and the marital community composed thereof, Defendants

ANSWER OF DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY

ANSWER

Defendant, Executive Benefits Insurance Agency ("Defendant"), by and through its attorney, Jeffrey B. Teichert of the law firm of Teichert Law Office, PC, and answer the Complaint in this matter as follows:

1 Paragraph 1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

2.1 Paragraph 2.1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

2.2 Paragraph 2.2 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

2.3 Admit.

2.4 Paragraph 2.4 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

3.1 Admit.

3.2 Defendant admits that Peter Arkison was appointed Trustee. However, the remainder of Paragraph 3.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

3.3 Admit.

3.4 Admit.

3.5 Defendant admits that Peter Pearce is a married man and that he and his wife are residents of the State of Washington. However, the remainder of Paragraph 3.5 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

3.6 Defendant admits that Nicholas Palaveda and Marjorie Ewing are husband and wife, and that they are residents of the State of Washington. However, the remainder of Paragraph 3.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.1 Defendant admits that BIA was involved in the insurance business, that it offered 412(i) plans, and that its customers included doctors, dentists, and lawyers. However, the remainder of Paragraph 4.1 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.2 Admit.

4.3 Admit.

4.4 Defendant denies that Nicholas Palaveda was a shareholder of BIA but admits that Marjorie Ewing was a majority shareholder thereof.

4.5 Admit.

4.6 Defendant admits that ARIS was incorporated in the State of Washington on September 11, 2003 and that Marjorie Ewing is a shareholder in A.R.I.S. The remainder of Paragraph 4.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.7 Defendant denies paragraph 4.7, but clarifies that A.R.I.S had a business relationship with BIA.

4.8 Defendant admits that A.R.I.S. and BIA filed a joint tax return but denies that the two organizations are a single entity.

4.9 Defendant denies the allegations of Paragraph 4.9, but clarifies that Palaveda was one of the directors of BIA during the time period specified.

4.10 Admit.

4.11 The Defendant admits that both companies used Quickbooks but denies the allegations of para-

graph 4.11 that they used the same files. Each company had a separate login and password.

4.12 The Defendant denies Paragraph 4.12 for lack of knowledge.

4.13 Defendant denies the allegations of Paragraph 4.13.

4.14 Defendant admits Paragraph 4.14 but clarifies that BIA transferred money in payment to A.R.I.S. for plan designs and consulting on prospective and current plans.

4.15 The Defendant admits Paragraph 4.15 but clarifies that A.R.I.S. filed a separate state tax return.

4.16 The Defendant admits that BIA is an insurance agency and marketed retirement plans and assisted agents in selling the plans and the policies to fund them. The Defendant denies the remaining allegations of Paragraph 4.16 for lack of knowledge.

4.17 Admit.

4.18 Admit.

4.19 The Defendant denies that allegations of Paragraph 4.19 for lack of knowledge.

4.20 Defendants admit that records were altered, but clarify that this was done to accurately account for the transactions between the two companies. The Defendant denies the remainder of Paragraph 4.20 for lack of knowledge.

4.21 Defendants admit that records were altered, but clarify that this was done to accurately account for the transactions between the two companies.

The Defendant denies the remainder of Paragraph 4.21 for lack of knowledge.

4.22 Defendants admit Paragraph 4.22, but clarify that these expenses were for plan designs and consulting services to BIA.

4.23 Defendants deny that there was any haste in clarifying the records and further clarify that any alterations were done to accurately reflect the relationship between the companies. BIA received plan design services from A.R.I.S.

4.24 Defendants deny Paragraph 4.24 for lack of knowledge.

4.25 Defendants admit Paragraph 4.25, but clarify that said expenses were for administrative assistance in winding down BIA.

4.26 Defendants admit Paragraph 4.26, but clarify that said expenses were for administrative assistance in winding down BIA.

4.27 Defendants admit Paragraph 4.27, but clarify that said expenses were for administrative assistance in winding down BIA.

4.28 Defendants deny Paragraph 2.8 and clarify that BIA's assets were listed as part of the bankruptcy estate.

4.29 Paragraph 4.29 is denied.

4.30 Paragraph 4.30 is denied.

4.31 Admit.

4.32 Defendants deny Paragraph 4.32 and clarify that Nick Palaveda is the sole owner of EBIA.

4.33 Paragraph 4.33 is denied.

4.34 Paragraph 4.34 is denied. Said commissions were the property of Peter Pearce and not BIA.

4.35 Paragraph 4.35 is denied. Any commissions paid to BIA would have gone into the BIA bank account. There were none owing because BIA was on cash basis accounting.

4.36 Paragraph 4.36 is denied. Said assets were reported in the bankruptcy petition.

4.37 Paragraph 4.37 is denied. EBIA negotiated its own contracts with Principal, Lafayette, ANICO, and others. EBIA did not open a bank account until May of 2006. No commissions were received until May of 2006.

4.38 Paragraph 4.38 is denied.

4.39 Paragraph 4.39 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.40 Admit.

4.41 Admit.

4.42 Admit.

4.43 Admit.

4.44 Admit.

4.45 Admit.

4.46 Defendants admit that a fraudulent transfer action was filed. Defendants deny that EBIA and A.R.I.S. took over for the arbitration plaintiffs.

4.47 Admit.

4.48 Defendant denied the allegations of Paragraph 4.48 and clarify that it was Pearce who revoked his assignment of commissions to BIA.

4.49 Paragraph 4.49 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.50 Paragraph 4.50 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.51 Paragraph 4.51 is denied for lack of knowledge.

4.52 Paragraph 4.52 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.53 Paragraph 4.53 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies. EBIA specifically denies that it intended to defraud any creditor of BIA.

4.54 Paragraph 4.54 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

4.55 Admit.

4.56 Defendant admits that BIA failed to answer Palaveda's complaint and that a stipulated judgment was entered, but denies that Mr. Palaveda's wife was the sole director of BIA.

4.57 Defendant admits that Ewing was a director and Palaveda was an officer and employee of the debtor.

4.58 Defendant denies Paragraph 4.58 but clarifies that Palaveda and Ewing received salaries and expense reimbursements from BIA in the ordinary course of business.

4.59 Paragraph 4.59 is denied.

5.1 All previous answers are reasserted.

5.2 Paragraph 5.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

5.3 Paragraph 5.3 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

5.4 Defendant denies Paragraph 5.4 for lack of knowledge.

5.5 Paragraph 5.5 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

6.1 Reassert all previous answers.

6.2 Paragraph 6.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

6.3 Paragraph 6.3 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

6.4 Paragraph 6.4 is denied.

6.5 Paragraph 6.5 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

6.6 Paragraph 6.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

7.1 All previous answers are reasserted.

7.2 Paragraph 7.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

7.3 Paragraph 7.3 is denied.

7.4 Paragraph 7.4 is denied.

7.5 Paragraph 7.5 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

7.6 Paragraph 7.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

8.1 All previous answers are reasserted.

8.2 Paragraph 8.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

8.3 Defendant denies Paragraph 8.3 for lack of knowledge.

8.4 Defendant denies Paragraph 8.4 for lack of knowledge.

8.5 Paragraph 8.5 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

8.6 Paragraph 8.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

9.1 All previous answers are reasserted.

9.2 Defendant denies Paragraph 9.2 for lack of knowledge.

9.3 Defendant denies Paragraph 9.3 for lack of knowledge.

9.4 Paragraph 9.4 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

9.5 Defendant denies Paragraph 9.5 for lack of knowledge.

9.6 Paragraph 9.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

9.7 Paragraph 9.7 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

10.1 All previous answers are reasserted.

10.2 Paragraph 10.2 is denied.

10.3 Paragraph 10.3 is denied.

10.4 Paragraph 10.4 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

10.5 Paragraph 10 is denied.

10.6 Paragraph 10.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

10.7 Paragraph 10.7 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

11.1 All previous answers are reasserted.

11.2 Paragraph 11.2 is denied.

11.3 Paragraph 11.3 is denied.

11.4 Paragraph 11.4 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

11.5 Paragraph 11.5 is denied.

11.6 Paragraph 11.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

11.7 Paragraph 11.7 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

12.1 All previous answers are reasserted.

12.2 Paragraph 12.2 is denied for lack of knowledge.

12.3 Paragraph 12.3 is denied for lack of knowledge.

12.4 Paragraph 12.4 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

12.5 Paragraph 12.5 is denied for lack of knowledge.

12.6 Paragraph 12.6 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

12.7 Paragraph 12.7 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

13.1 All previous answers are reasserted.

13.2 Paragraph 13.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

13.3 Paragraph 13.3 is denied for lack of knowledge.

13.4 Paragraph 13.4 is denied for lack of knowledge.

13.5 Paragraph 13.5 is denied for lack of knowledge.

13.6 Paragraph 13.6 is denied for lack of knowledge.

13.7 Paragraph 13.7 is denied for lack of knowledge.

13.8 Paragraph 13.8 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

14.1 All previous answers are reasserted.

14.2 Paragraph 14.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

14.3 Paragraph 14.3 is denied.

14.4 Paragraph 14.4 is denied.

14.5 Paragraph 14.5 is denied.

14.6 Paragraph 14.6 is denied

14.7 Paragraph 14.7 is denied.

14.8 Paragraph 14.8 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

15.1 All previous answers are reasserted.

15.2 Paragraph 15.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

15.3 Paragraph 15.3 is denied.

15.4 Paragraph 15.4 is denied.

15.5 Paragraph 15.5 is denied.

15.6 Paragraph 15.6 is denied.

15.7 Paragraph 15.7 is denied.

15.8 Paragraph 15.8 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

16.1 All previous answers are reasserted.

16.2 Paragraph 16.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

16.3 Paragraph 16.3 is denied for lack of knowledge.

16.4 Paragraph 16.4 is denied for lack of knowledge.

16.5 Paragraph 16.5 is denied for lack of knowledge.

16.6 Paragraph 16.6 is denied for lack of knowledge.

16.7 Paragraph 16.7 is denied for lack of knowledge.

16.8 Paragraph 16.8 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

17.1 All previous answers are reasserted.

17.2 Paragraph 17.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

17.3 Paragraph 17.3 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

18.1 All previous answers are reasserted.

18.2 Paragraph 18.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

19.1 All previous answers are reasserted.

19.2 Paragraph 19.2 is denied.

19.3 Paragraph 19.3 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

19.4 Paragraph 19.4 is denied.

20.1 All previous answers are reasserted.

20.2 Paragraph 20.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

21.1 All previous answers are reasserted.

21.2 Paragraph 21.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

22.1 All previous answers are reasserted.

22.2 Paragraph 22.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

22.3 Paragraph 22.3 is denied.

22.4 Paragraph 22.4 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

23.1 All previous answers are reasserted.

23.2 Paragraph 23.2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.

24. All allegations of the Complaint neither admitted nor denied are denied.

AFFIRMATIVE DEFENSES

25.1 The Complaint fails to state a claim upon which relief may be granted.

25.2 Trustee lacks standing to bring these claims, particularly any claim that relies on piercing the corporate veil or successor liability.

25.3 BIA received reasonably equivalent value for each transfer alleged in the complaint.

25.4 For each transfer alleged in the complaint to have been made on account of an antecedent debt, the transfer was made in the ordinary course of busi-

ness of the transferor in the transferee, and on ordinary business terms.

25.5 For each transfer alleged in the complaint to have been made on account of an antecedent debt, the transferee provided "new value" to the transferor following the date of the transfer, in an amount greater than the amount of the transfer.

25.6 Executive Benefits Insurance Agency is not a successor entity to Bellingham Insurance Agency.

JURY DEMAND

26.1 Defendant elects to have the above-entitled cause of action tried before a jury on all issues upon which it is entitled to a jury. Defendant does not consent to have said jury trial in this Court or any other bankruptcy panel.

DATED this 1st day of August, 2008.

TEICHERT LAW OFFICE, PC
/s/ Jeffrey B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Defendant

Hon. Thomas T. Glover

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc., Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, and A.R.I.S. and NICHOLAS PALAVEDA and MAJORIE EWING, And PETER PEARCE and PETER PEARCE and JANE DOE PEARCE, Defendants.

MOTION TO VACATE TRIAL DATE

BACKGROUND

COMES NOW, Executive Benefits Design Group ("EBDG"), and moves this Court for

an order vacating the trial date in this matter.

DATED this 21st day of December 2009.

TEICHERT LAW OFFICE, PC
/s/ Jeffrey B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Executive Benefits Insurance Agency

Judge: Thomas T. Glover
Chapter: Chapter 7
Trial Date: January 4, 2010
Hearing Time: 9:30 a.m.
Hearing Site: 700 Stewart Street, #7206
Seattle, WA 91801

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY, INC., Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc., Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, and A.R.I.S. and NICHOLAS PALAVEDA and MAJORIE EWING, And PETER PEARCE and JANE DOE PEARCE, Defendants.

PLAINTIFF'S OBJECTION/RESPONSE TO MOTION TO VACATE ORDER SETTING TRIAL DATE

PETER ARKISON, the Chapter 7 Trustee in the above captioned bankruptcy case by and through his counsel, Wood & Jones, P.S., hereby responds to the

motion to vacate the Trial dates and also submits this trial brief in the above referenced adversary proceeding.

I. RESPONSE TO MOTION TO VACATE TRIAL DATE

This Court ruled on the Plaintiff's Motion for Summary Judgment on November 20, 2009 and at that time set the trial date for January 4, 2010. The minute entry hit the docket on the same day, November 20, 2009 and says that the trial date is continued to January 4, 2010.

Neither the Pearce Defendants nor the EBIA defendants took any action until December 21, 2009 at which time they filed a motion to vacate the trial date but did not note the matter for hearing, did not seek to shorten time to have the motion heard, did not request a telephone conference with the Judge and all the parties, nor did they file a received unsigned order.

Mr. Sturdavent called the undersigned approximately one week prior to filing the motion to vacate trial date and instructed the undersigned that she needed to get the jury pool since this was a jury trial. Moewes said this was the first she had heard this was a jury trial. She looked at the answers filed and the docket and found no request for a jury trial and so advised Mr. Sturdavent. A few days later it was discovered that the answer of EBIA and the demand for a jury trial were filed in the main case.

There are three reasons why the Defendants are not entitled to a jury trial.

Firstly, the summons was timely served and thus the answer of all defendants was due on July 3,

2008. The answer of EBIA and demand for jury trial was filed in the main case on August 6, 2009 (docket #170 and #171). These documents were not filed in the adversary proceeding. Fed. R. Civ. P. governs right to a jury trial. Specifically, Rule 38 states:

> (b) Demand. On any issue triable of right by jury, a party may demand a jury trial by:
>
> (1) serving the other parties with a written demand — which may be included in a pleading- no later than 14 days after the last pleading directed to the issue is served; and
>
> . . .
>
> (d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed.

EBIA was served with the summons and complaint on June 12, 2008 and thus it had 14 days from that date to request a jury trial - June 26, 2008. EBIA did not file the jury demand until August 8, 2006 and thus it missed the deadline to request a jury demand by approximately 42 days and thus it waived its right to a jury trial.

Secondly, Fed.R.Civ.P. 28(d) has a specific requirement that the jury demand be properly served and filed. In this case it is undisputed it was not properly filed as it was filed in the wrong case.

Thirdly, Federal Rule of Bankruptcy Procedure 9015 states that the parties are required to file a statement of consent indicating whether the parties consent to the Bankruptcy Judge conducting the jury trial. The

filing of this document then indicates who has to obtain the jury, the Bankruptcy Court or the Federal District Court. In this case no Rule 9015 statement of consent has been filed.

Further, the trustee believes all of the matters are core proceedings to which no right to a jury trial applies.

Defendants ARIS, Pearce, Palaveda and Ewing did not demand a jury trial. Defendant EBIA waived its right to a jury trial by failing to comply with the requirements set forth in Fed.R.Civ.P. 38.

The motion to vacate the trial date should be denied.

DATED this 30th day of December, 2010.

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes,
WSB#19464
Attorney for Trustee
Peter Arkison

Entered on Docket Dec. 31, 2009

Judge Thomas T. Glover
Chapter 7

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY, Debtor,

Adv. No. 08-01132-TTG

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiffs,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., d/b/a Executive Benefits Design Group, A.R.I.S., INC., a Washington Corporation, MAJORIE EWING and NICHOLAS PALAVEDA, and their marital estate, and PETER PEARCE and JANE DOE PEARCE, and their marital estate, Defendants.

ORDER VACATING TRIAL DATE AND REFERRING CASE TO DISTRICT COURT JUDGE

(PROPOSED)

THIS MATTER having come before the Court upon the motion of defendant Executive Benefits Insurance Agency, Inc., to vacate the trial date, which motion defendant Peter Pearce concurred in with his response and upon consideration of the motion and the

response and the pleadings and files herein and good cause having been shown, now therefore it is by the Court:

ORDERED that the instant trial date be and the same hereby is vacated;

IT IS FURTHER ORDERED that the trial of this case be referred to a judge of the United States District Court for the Western District of Washington at Seattle.

DATED at Seattle, WA, this ___ day of _____, 2009.

/s/ Thomas T. Glover
Thomas T. Glover
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

Prepared and presented by:

James Sturdevant WSBA #8016
Attorney for Defendant, Peter Pearce

PROOF OF SERVICE

I hereby certify that I served a true and complete copy of the foregoing ORDER VACATING TRIAL DATE AND REFERRING CASE TO DISTRICT COURT JUDGE (PROPOSED) on December ____, 2009, upon:

Jeffrey Teichert
1313 E. Maple Street,
Ste 233
Bellingham, WA 98225

Nick Paleveda
4164 Guide Meridian, Ste
400
Bellingham, WA 98226

Denise Moewes
303 N. 67th Stree
Seattle, WA 98103-
5209

Donald A. Bailey
1218 Third Avenue, Suite
1808
Seattle, WA 98101

[x] Via electronic delivery to:

[ ] Via US First Class Mail

[ ] Via hand delivery

[ ] Via legal messenger

DATED this 30th day of December, 2009.

/s/ James Sturdevant

James Sturdevant WSBA
#8016
Attorney for Peter Pearce

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. C10-171RAJ

PETER ARKISON, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., et al., Defendants.

MINUTE ORDER

The following minute order is made by the direction of the court, the Honorable Richard A. Jones:

The court has received this matter on a withdrawal of its reference to the bankruptcy court. Although the purpose of the withdrawal of the reference was to permit this court to conduct a jury trial, the parties have informally informed the court that they disagree as to what, if any, pretrial proceedings are necessary to prepare the case for trial.

Accordingly, the court directs the parties to meet and confer and prepare a joint status report that addresses the following matters: 1) A summary of the proceedings in the bankruptcy court; 2) A statement of what pretrial proceedings are necessary in this court; and 3) A statement of what date the parties will be ready for trial. The court prefers that the parties reach agreement on these matters, but if they do not, they may address their positions separately within the joint status report. The parties shall submit the joint status report no later than March 12, 2010.

Filed and entered this 25th day of February, 2010.

BRUCE RIFKIN,

Clerk of the Court

/s/ Victoria Ericksen

Deputy Clerk to Hon. Richard A. Jones

Judge Thomas T. Glover
Chapter: Chapter 7
Hearing Date: April 14, 2010
Hearing Time: 9:30 a.m.
Hearing Site: Marysville Municipal Court
1015 State Avenue
Marysville, WA 98270
Response due: April 7, 2010

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Bankruptcy No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY, Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, Et. Al., Defendants.

PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT ON PLAINTIFF'S COMPLAINT TO RECOVER FRAUDULENT TRANSFERS SOLEY AS TO DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY

Peter Arkison, the Chapter 7 Trustee in this case and Plaintiff in the above-captioned adversary

proceeding, by and through his undersigned counsel, respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Bankruptcy Rule 7056 and Local Rule 9013, for Summary Judgment on the Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant EBIA on the basis that the plaintiff is entitled to judgment as a matter of law.

This motion for summary judgment is based on the Trustee's Motion, the memorandum in support thereof, the Declaration of Michael Quackenbush and the exhibits attached thereto, and the Declaration of Denice Moewes and the exhibits thereto.

Dated this 17th day of March 2010.

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Trustee
Peter Arkison

Judge Thomas T. Glover
Chapter: Chapter 7
Hearing Date: April 14, 2010
Hearing Time: 9:30 a.m.
Hearing Site: Marysville Municipal Court
1015 State Avenue
Marysville, WA 98270
Response due: April 7, 2010

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Bankruptcy No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, Et. Al.,
Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT TO RECOVER FRAUDULENT TRANSFERS SOLELY AS TO DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY, INC.

Peter Arkison, the Chapter 7 Trustee in the above-referenced case and plaintiff in the above-

captioned adversary proceeding submits this Memorandum in support of his Motion for Summary Judgment on Trustee's Complaint solely as to Defendant Executive Benefits Insurance Agency ("EBIA") as set forth below.

I. FACTUAL BACKGROUND

1.1 Bellingham Insurance Agency, Inc. filed a voluntary chapter 7 bankruptcy petition on June 1, 2006 ("Petition Date") ("BIA" or "Debtor").

1.2 BIA was involved in the insurance business and had a niche market in 412(i) retirement plans.

> ***Q. Was there a lot of companies to choose from, or is this market such a niche that there's only very small companies from which to choose from?***
>
> ***A. It's a niche market.***

See deposition of John Bremer, page 11, lines 5-8 attached to the Declaration of Denice Moewes ("Moewes Declaration") as Exhibit "1". The Moewes Declaration is filed simultaneously herewith.

1.3 BIA also used the name of 412(i) Company during its operations. 412(i) is not incorporated in any state and is nothing more than a dba or trade name of BIA as evidenced by the attached exhibits showing the Washington State Department of Licensing and Washington State Department of Revenue information concerning Bellingham Insurance Agency and The 412(i) companies. See Moewes Declaration, Exhibit "2".

1.4 Marjorie Ewing owns 80% of the shares of the debtor and Charles Gramp owns 10% of the debtor. (docket #1- Statement of Financial Affairs).

> ***Q. Do you have any ownership in ARIS?***
>
> ***A. Yes, I do, of ARIS.***
>
> ***Q. Okay.***
>
> ***A. I own ten percent of it.***

See deposition of Charles Gramp, page 6, lines 6-9, Exhibit "3" to the Moewes Declaration.

1.5 There are two components to the 412(i) business - the sale of the insurance plan and the plan design. ARIS provided the plan design part. BIA provided marketing and sale services.

> ***Q. Can you tell me in laymen's terms what function ARIS performed and what function BIA performed in the 412(i)?***
>
> ***A. ARIS is primarily a TPA. And that is a third party administrator providing actuarial and administerial administrative services for qualified plans; be they 412(i) plans, traditional defined benefit plans, 401k plans, profit sharing.***

---

[1] ARIS is a separate corporation and is the company that provides the administrative assistance for the plans.

Q. What did BIA do?

A. That's a marketing arm, and they generated the revenue necessary to keep ARIS aflost.

Q. They generated the revenue by selling the plans or bringing the client in?

A. By bringing the client in. Some of it, I guess, was due - - some of it from fee. Some of it from insurance commissions.

Q. And then the plan design was done by ARIS?

A. Right.

See deposition of Charles Gramp, page 6 line 16 through 25, page 7 line 1 8. See also: deposition of John Bremer, page 11, line 22 through 25, page 12, line 1, Exhibit "1" to the Moewes Declaration; Deposition of Peter Pearce, page 10, line 18 through 25, page 11, lines 1- 8, page 12, Moewes Declaration, Exhibit "7".

1.6 While BIA provided the marketing for the plans BIA could not legally maintain the plan or sign the actuary statement. The sole responsibility for maintaining the plans and keeping them in compliance lies solely with ARIS.

Q. I have just one question, but I want to clarify something. Since you've got the Chinese Wall and BIA just does marketing, BIA never maintains the plans and signs the actuary –

A. *They can't.*

Q. They can't. The only person that can sign those and the responsibility to keep them in compliance lies solely with ARIS.

A. Lies solely with ARIS.

See Deposition of Charles Gramp, page 20, lines 15-23, Moewes Declaration Exhibit "3".

1.7 Nicholas Palaveda ("Palaveda") was the sole director, President and CEO of BIA from its inception through February 14, 2006. On February 14, 2006 Palaveda resigned his position and was replaced by Ewing as the sole director of BIA. See Quackenbush Declaration, ¶11, docket #21 in adversary proceeding.

1.8 Up until January 31, 2006 ARIS and BIA shared the same office, located at 4164 Meridian Street, #400, Bellingham, Washington. Quackenbush Declaration, ¶12, (docket #21 in adversary proceeding). See also deposition of Patricia Habig, page 7, lines 13-17 which is attached to the Moewes Declaration as Exhibit "4".

1.9 On January 31, 2006 Executive Benefits Insurance Agency was incorporated in the State of Delaware. Moewes Declaration, Exhibit "5".

1.10 At the close of business on January 31, 2006 the debtor, BIA, ceased to operate according to Sarah Pearce, one of the employees of BIA on January 31, 2006:

Q. So were you aware on January 31, 2006 that BIA ceased to operate?

A. Yes.

Q. Were you aware that on February 1, 2006, EBIA started operating?

A. Yes.

See deposition of Sarah Pearce, page 13, lines 3-8 attached to the Moewes Declaration as Exhibit "6".

1.11 On February 1, 2006 EBIA commenced operations in the same space in which BIA had done business. See deposition of Sarah Pearce, page 13, lines 3-8, Exhibit "6" Moewes Declaration.

1.12 There was no change to any aspect of the BIA business, the office, employees or the structure from the time BIA shut down and EBIA started up. In fact the only change was the name change from BIA to EBIA.

Q. *So basically from September 1, 2003 to August 31, 2009, did anything really change in the business where you were at? Was it the same employees, same address, same phone number?*

A. Yes.

Q. You provided the same services?

A. Yes

Deposition of John Bremer, page 7, line 20 through 25 page 8, line 1, Moewes Declaration, Exhibit "1".

> ***Q. When EBIA started up on February 1st when BIA closed down, how many employees did they have?***
>
> ***A. BIA?***
>
> ***Q. EBIA.***
>
> ***A. I think it was just Peter. I'm not sure.***
>
> ***Q. From your perspective of being in the same office, was there any change from when BIA closed down and EBIA started up?***
>
> ***A. Not as far as – not from ARIS's point, working in ARIS***

Deposition of Sarah Pearce page 14, lines 17-21, Moewes Declaration, Exhibit "6".

> **Q.** ***Have you ever been employed by Bellingham Insurance Agency?***
>
> **A.** ***Well, I know I got my salary checks from them.***
>
> ***Q. What is your job title at ARIS?***
>
> ***A. Well, I'm now in marketing and new business.***

Q. In a new business?

A. It's marketing and new business. It's all marketing really.

Q. Is it still for ARIS, or are you with EBIA?

A. I'm not with EBIA.

Q. So with ARIS. When did you move to that position?

A. I don't know. Since 2003 and up until now I have been - -

Q. Same job?

A. It's the same job, yeah. It's in the same place.

See deposition of Priscilla Habig, page 7, lines 13-17, Moewes Declaration, Exhibit "4". See also deposition of Peter Pearce page 5, line 12 through 25 page 6, line 1-24 and page 10, lines 10-13, page 14, lines 11 through 25, page 15 lines 1-20 Moewes Declaration, Exhibit "7" and deposition of Priscilla Habig, page 10, lines 1-14 Moewes Declaration, Exhibit "4".

FACTS RELATING TO STATE COURT LITIGATION

1.13 Between October 31, and November 4, 2005, an Arbitration proceeding was held relating to claims between Paul Hess ("Hess"), Glenn Price ("Price") and Charles Farrington ("Farrington") (collectively the "Arbitration Defendants") and ARIS, BIA, Ewing, Palaveda and Pearce (Collectively "Arbi-

tration Plaintiffs") arising out of the former business relationship between the Arbitration Plaintiff's and the Arbitration Defendants. (Docket #39, Part 2, ¶1, Main case)).

1.14 On November 21, 2005 Arbitrator Scott B. Easter ("Arbitrator") issued an Interim Award that exonerated the Arbitration Defendants of the Arbitration Plaintiffs allegations and claims. The Arbitrator further ruled that the Arbitrator Defendants met their burden of proof that they were entitled to indemnification as officers and directors and accordingly, were entitled to an award of "reasonable expenses" pursuant to RCW 23B.08.520, as well as an award of all expenses and liabilities including counsel fees, reasonably incurred pursuant to the corporations bylaws. (Docket #39, Part 2, 71, Exhibit "A" Main case).

1.15 On February 3, 2006, the Arbitrator issued his Final Reasoned Award that incorporated the Interim Award by reference and that awarded the Arbitration Defendants attorney's fees and expenses for a net award of $90,021.92 with a corresponding judgment. (Docket #39 Part 2, 72, Exhibit "B" Main case). Two days prior to the issuance of the Final Reasoned Award BIA had ceased to operate and EBIA had started operating in its stead.

1.16 The Arbitration Plaintiffs filed a motion to vacate the arbitration award. On March 6, 2006 the Court entered a written Order denying the motion to vacate and amending the judgment to provide an award of attorneys fees to the Arbitration Defendants for fees incurred in responding to the motion to vacate. The judgment was increased from $90,012.92 to $104,212.42. (Docket #39, Part 2, 73, Exhibit "C" Main case).

1.17 The Arbitration Defendants subsequently commenced execution on the judgment by, among other things, seeking and issuing writs of garnishment against several insurance companies with which BIA did business and which, it is believed, owed BIA money. (Zimbelman Decl. docket #1, Part 13, 73 in adversary proceeding number 06-1306). One of those insurance companies was American National Insurance Company ("ANICO"). (*Id.*; Exhibit 2). From discovery in the underlying arbitration that resulted in a judgment against BIA, it is known that BIA did hundreds of thousands of dollars of business with ANICO and that ANICO may have been BIA's largest single source of revenue. (*Id.*).

1.18 On April 17, 2006, ANICO's Manager of Licensing and Payroll for ANICO acknowledged receipt of the Writ on behalf of ANICO, but wrote that "our records indicate that Bellingham Insurance Agency, Inc. has an absolute assignment set up with Peter Pearce." (Zimbelman Decl. docket #1, Part 13, 74 in adversary proceeding number 06-1306). The ANICO manager wrote further that ANICO is "sending back the Writ of Garnishment because we will not be able to answer any questions regarding Bellingham Insurance Agency because of the absolute assignment in place." (*Id.*).

1.19 ANICO subsequently provided additional information regarding the "absolute assignment" allegedly entered into between BIA and Peter Pearce. Specifically, ANICO's representative, Gloria Dominguez, updated her previous letter to identify and attach a copy of the assignment document. That assignment was purportedly signed by Pearce and Marjorie Ewing

on behalf of BIA on February 14, 2006, although the facsimile time stamp on the document indicates that it was first provided to ANICO on February 28, 2006. (Zimbelman Decl. docket #1, Part 13, Exhibit "4" in adversary proceeding number 06-1306). By comparison, this Court confirmed the Final Reasoned [Arbitration] Award and entered judgment on February 3, 2006 (Ex. 1), denied Plaintiff's motion to vacate the award from the bench on February 17, 2006, and amended the judgment to add additional attorney's fees on March 6, 2006.

1.21 Peter Pearce is the licensed Washington insurance agent who is or was also employed by BIA as the director of underwriting and licensing. Pearce testified for BIA in the arbitration in early November 2005. (Zimbelman Decl. docket #1, Part 13, Exhibit "5", Hr'g Transcript, 11/1/05 p. 67). Pearce served or serves as the agent of record for BIA, which holds its own licensing that allows it to receive insurance commissions under Washington law. (Id. at 76). At the Arbitration hearing, Mr. Pearce testified that he assigned all commissions earned from the insurers BIA works with, including ANICO, to BIA. (Id. p. 102). The reason for the assignment was simply that Mr. Pearce served as a pass-through so that commissions could be received by BIA:

Q. Mr. Pearce, do you assign your commissions to the 412(i) Company?

A Yes.

Q And why is that?

A I'm the agent for the company and not taking the commissions as a personal income.

Q Do you feel that that is the role you fill for the company?

A That's my understanding.

Q Have you ever taken a portion of the commission personally? Let me rephrase this question. Have you ever personally taken a portion of a company case as a personal commission?

A No.

Q So you're paid strictly on a salary pays?

A Correct.

(*Id.* at 102). The relationship between BIA, Pearce and ANICO is clear. (*See e.g.*, licensing documents, Zimbelman Decl. docket #1, Part 13, Exhibit "6" in adversary proceeding number 06-1306). E

1.22 On February 14, 2006 BIA executed an Absolute Assignment of Commission in which it transferred its rights to receive any and all commissions to Peter Pearce. Moewes Declaration, Exhibit "9".

1.23 Thereafter the majority, if not all, of the commissions Pearce received pursuant to the Absolute Assignment of Commissions from BIA were deposited into the ARIS bank account but credited to EBIA via intercompany transfers on Quickbooks. A total of $122,454.30 was deposited by Pearce into the EBIA account. See Declaration of Michael Quackenbush filed simultaneously herewith, and Exhibit "1" thereto.

1.24 Another $277,88582 was deposited into ARIS as a result of "commissions" EBIA received. Quackenbush Declaration

1.25 However, it was not possible for EBIA to commence business on February 1, 2006 and generate commissions this quickly so the funds had to be commissions that belonged to BIA according to the deposition testimony of Peter Pearce:

> Q. Just generally, what are the time periods between like the sale of an insurance policy, 412(i) policy, and insurance company payment?
>
> Well, let me ask a more general question. In terms of -- let's say a client came in to ARIS or BIA - - I don't understand which one they'd go to -- and said, I want you to, you know, give me a proposal to build a plan, and let me see what it would look like. What is the time period to build a proposal, get it to the client? Does it take months? Does it take weeks? Days?
>
> A. Months to years.
>
> Q. What?
>
> A. Months to years.
>
> Q. And I guess that's because you would need to look at their other defined contributions.
>
> A. Depends on what the client wants.
>
> Q. But it's a complicated procedure, I'm assuming.

A. Yes.

Q. So let's say that you design -- the company designed a plan, and the ultimate client approves it, what is the time period between your sale of that plan and insurance company payment?

A. Could be months to years.

Deposition testimony of Peter Pearce, Page 21 lines 24-25, page 22 lines 1-23, Moewes Declaration, Exhibit "7". Also see Quackenbush Declaration.

1.26 Shortly after BIA ceased to operate, its website was no longer accessible, but virtually all of the same content, and the same business, is advertised and conducted through a new website under a new name. Whereas BIA formerly did business as the 412i Company, it is now doing business as Executive Benefits Design Group ("EBDG"). (Zimbelman Decl. . docket #1, Part 13 Exhibit 7 and 8 in adversary proceeding number 06-1306). The identical or nearly identical information on the new website includes biographical information about key employees of EBDG, including Nicholas Paleveda, Marjorie Ewing, and Peter Pearce. EBDG does business in the same building and at the same address as BIA does/did business. (*Id.*). The EBDG web site states that "the company's origins date back to 1984," and that "EBDG was formally incorporated in February of 2006." (Id.).

1.27 Additional facts that further demonstrate the transparently fraudulent nature of the relationship between BIA and EBDG, are as follows:

- According to the Washington Department of Revenue, EBDG is doing business at 4164 Meridian St. Ste. 400, Bellingham, Washington 98226, which is the same address at which BIA did or does business. (Zimbelman Decl. docket #1, part 13, Exhibit 10 in adversary proceeding number 06-1306).

- EBIA, d/b/a EBDG became a licensee with the Office of the Insurance Commissioner for the State of Washington on March 23, 2006. ((Zimbelman Decl. docket #1, part 13, Exhibit 11 in adversary proceeding number 06-1306).

- EBIA/EBDG has a license affiliation with Peter Pearce, effective March 23 2006. (Zimbelman Decl. docket #1, part 13, Exhibit 12 in adversary proceeding number 06-1306).

- Pearce has maintained an affiliation with BIA since September 2003 when he first became the licensed agent for BIA. (*Id.*). Mr. Paleveda admitted in his declaration opposing Plaintiffs'/Judgment Creditors' motion for temporary injunction that Pearce "began to work for" (i.e., is the licensed agent for) EBDG. ((Zimbelman Decl. docket #1, part 13, Exhibit 13 in adversary proceeding number 06-1306).

- EBIA/EBDG has company affiliations with American National Insurance Company ("ANICO") and the Principal Life Insurance Company, two insurers with whom BIA has done substantial business and from whom garnishments have been sought. ((Zimbelman Decl. docket #1, part

13, Exhibit 14 in adversary proceeding number 06-1306).

1.28 On June 2, 2006 the Arbitration Defendant's filed a Complaint to Recover Fraudulent Transfers against EBIA, Ewing, Palaveda and Pearce in Whatcom County Superior Court which was assigned case number 06-2-01256-5. (docket #1, Part 3 and 48 in adversary proceeding number 06-1306).

1.29 The Arbitration Defendants filed an Emergency Motion for Temporary Restraining Order and for Writ of Attachment on June 6, 2006 in the Whatcom County Case which alleged substantially the same facts as set forth in paragraph 1.14 through 1.24 above. (docket #1, Part 27 in adversary proceeding number 06-1306).

1.30 Based on the above-described facts on May 12, 2006, the Whatcom County Superior Court Judge entered a Temporary Injunction as follows:

> It is further ordered that the Judgment Debtor is temporarily restrained from transferring, encumbering or disposing of any assets belonging to or in the possession of Bellingham Insurance Agency, Inc. or Executive Benefits Design Group/Executive Benefits Insurance Agency, Inc. that are traceable to the assets or business of Bellingham Insurance Agency, Inc. pending resolution of the Judgment Creditors' motion on renote.

(docket #1, Part 51 in adversary proceeding number 06-1306).

1.31 The Debtor filed this bankruptcy proceeding 18 days later.

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when the evidence presents no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of asserting that the pleadings, depositions, answers to interrogatories, admissions and affidavits establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden, the non-moving party must demonstrate through competent affidavits that there is a genuine issue of material fact requiring a trial. Conclusory statements, argumentative assertions and allegations of unanswered questions will not defeat a properly supported motion for summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed 2d 202 (1986), and the non-moving party must show more than a "metaphysical doubt" as to the material facts.

An issue of fact is not genuine unless sufficient evidence has been presented favoring the non-moving party for a jury to return a verdict for that party. *Anderson*, 91 L. Ed. 2d at 212. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 552 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 91 L. Ed. 2d at 212 (citations omitted).

There are no genuine issues of material fact in this case. The Trustee's motion should be granted as a matter of law.

III. ISSUES

1. Does the transfer of BIA's business from BIA to EBIA constitute a fraudulent transfer pursuant to section 548 of the Bankruptcy Code?

2. Is EBIA a mere successor of the Debtor, BIA?

IV. ARGUMENT

FRAUDULENT TRANSFERS UNDER SECTION 548 OF THE BANKRUPTCY CODE

A. The Transfer is avoidable under 11 U.S.C. Section 548(a)(2)

The transfer of all assets of the debtor to EBIA is avoidable pursuant to §548 of the Bankruptcy Code.

11 U.S.C. §548(a)(2) permits the Trustee of a Debtor to avoid transfers made within one year[2] before the date of filing of the petition if the Debtor received less than reasonably equivalent value in exchange for the transfer and was insolvent on the date such transfer was made.

The following three criteria must be met in order for the Trustee to prevail:

---

[2] The October 17, 2005 amendment to section 548 extending the look back period to two years, had a one year moratorium on the amendment going into effect so on the date that the debtor filed the look back period was one year.

(1) the Transfer must have occurred within one year prior to the date the petition was filed;

(2) the Debtor did not receive reasonably equivalent value in exchange for the transfers;

and

(3) the Debtor was insolvent on the date of the Transfer.

The Trustee meets all three criteria in this case.

1. **The Transfer occurred within one year of filing.**

The Debtor filed its petition on June 1, 2006. The transfers at issue occurred on February 1, 2006, well within one year of the date the petition was filed.

2. **The Debtor did not receive reasonably equivalent value in exchange for the Transfer.**

The Debtor received nothing in exchange for the transfer of all of the debtor's assets to EBIA.

It should be emphasized that an important element of the reasonably equivalent value defense is the statutory language that the value alleged to be reasonably equivalent value must be given "in exchange for" the original transfers. It is difficult to ignore the express language of the statute, and several recent decisions have turned on this precise issue, In re Young, 82 R.3d 1407, 1415-16 (8th Cir. 1996), vacated and remanded on other grounds, sub nom. Christians v. Crystal Evangelical Free Church, 521 U.S. 1114, 117 S.Ct. 2502, 138 L.Ed.2d. 1007 (1996); In re Gomes, 219 B.R. 286, 293 (Bkrptcy. D.Or. 1998); In re Bloch, 207 B.R. 944,

948 (D.Colo. 1997); In re Hodge, 200 B.R. 884, 893, (Bkrptcy, D. Id. 1996, rev'd on other grounds, 220 B.R. 386 (D.Id. 1998); In re Newman, 183 B.R. 239, 248 (Bkrptcy, D.Kan. 1995), aff'd, 203 B.R. 468 (D.Kan. 1996).

In determining whether a debtor received reasonably equivalent value, the analysis is directed at what the Debtor surrendered and what the Debtor received, irrespective of the intent of any third party or what such third party may have gained or lost. See e.g. In re Grabill Corp., 121 B.R. 983, 994 (Bankr.N.D.Ill. 1990) (question of transferee's intent in the transaction is irrelevant; if a transfer solely benefits a third party, the Debtor is considered not to have received reasonably equivalent value); In re Burbank Generators, Inc. 48 B.R. 204 (Bankr.C.D. Cal.1985); See also Norton Bankruptcy Law and Practice 2d, section 58:4 (1994) (As a general rule, the transferee must give reasonably equivalent value to the transferor and not to a third party). See also In re O'Bannon, 484 F.2d 864, 867 (10th Cir. 1973) (payment by the debtor corporation of its two principal's bankruptcy attorneys was fraudulent because there was a complete absence of consideration. Only possible consideration that inured to the individual debtors was peace of mind).

3. The Debtor was insolvent on the Date of the Transfer.

The Quackenbush Declaration and the documentation attached thereto clearly establish that the Debtor was insolvent on the date of the transfers to Defendant ARIS that are at issue.

B. **The Trustee is also entitled to an award of interest on the Transfer of June 1, 2006 from the date of the Transfer until repaid.**

The Trustee contends that he is entitled to an award of both pre-judgment and post-judgment interest from the dates of the transfers until paid, at the federal judgment rate, which consists of the Treasury Bill auction rate in effect at or just before the time of the transfer. The federal judgment rate as of June 1, 2006 was 5.03%. This rate is specified in 28 U.S.C. §1961 as being:

> ". . . equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury Bills settled immediately prior to the date of the judgment.

Although §1961 is by its terms applicable to post-judgment interest, the 9th Circuit rule is that the post-judgment rate applies to prejudgment interest "unless the trial judge finds, on substantial evidence, that a different rate is appropriate." Blanton v. Anzalone, 813 F.2d 1574, 1575 (1987). Because of the 9th Circuit's "strong policy in favor of the Treasury bill rate . . . , any departure from it must be accompanied by a reasoned justification." Blanton, supra, at 1576. This same approach has been applied in a judgment to recover a preference in bankruptcy, In re Nucorp Energy, Inc., 902 F.2d 729, 734 (9th Cir. (1990), and in an action to recover damages for a violation of the automatic stay, Goichman v. Bloom, 875 F.2d 224,228 (9th Cir. 1989).

The Trustee is aware of no circumstances which would justify use of a lower interest rate.

C. THE TRANSFER IS ALSO AVOIDABLE AS A FRAUDULENT TRANSFER PURSUANT TO R.C.W. CHAPTER 19.40

R.C.W. 19.40.041 provides as follows:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1)With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2)Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the

transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

C(2). The Transfers are avoidable under RCW 19.40.051 as constructively fraudulent as the debtor did not receive reasonably equivalent value in exchange for the transfers.

The reason the transfers from the Debtor to Defendant EBIA are avoidable under section 548 of the Bankruptcy Code also render the transfers avoidable under R.C.W.19.40.

R.C.W. section 19.40.041(b) sets forth 11 nonexclusive factors to consider when determining whether the transfer was fraudulent. These 11 factors are listed above.

In relation to the transfers to Defendants EBIA factors 1, 2, 3, 4, 5, 9 and 10 are all present in this case. Thus, 6 of the 11 possible factors evidencing a fraudulent transfer are present in this case.

C(3). The Transfers are avoidable under RCW 19.40.041 as Having Been Made with Actual Intent to Hinder, Delay and Defraud Creditors.

In determining whether a transfer is fraudulent, the relevant intent is the intent of the debtor, not the transferee. In re Cohen, 199 B.R. 709, 716-17 (9th Cir. BAP 1996).

A 19.40.041(a)(1) claim of intentional fraud could result in avoiding a transfer without genuine fraud, in the sense of morally culpable conduct. In re Cohen, 199 B.R. 709, 716 (9th Cir. BAP 1996).

Insolvency is not required, In re Agricultural Research and Technology Group, Inc., 916 F.2d 528, 534 (9th Cir. 1990); because "[a]ny market-price transaction with a debtor who has the requisite state of mind to hinder creditors, to delay creditors or to defraud creditors may qualify as an actually fraudulent transfer," In re Cohen, 199 B.R. 709, 716 (9th Cir. BAP 1996).

The transaction is avoidable even if the debtor received reasonably equivalent value for the transfer, although the failure to receive reasonably equivalent value in exchange may be a factor in determining the intent to hinder, delay or defraud. This intent may be based on circumstantial evidence. In re Agricultural Research and Technology Group, Inc., 916 F.2d 528, 534-5 (9th Cir. 1990); In re Roco Corp., 701 F.2d 978, 984 (1st Cir. 1983).

Transfers challenged as made with actual intent to hinder, delay or defraud are voidable by the trustee if the purpose of the transfer was to prevent creditors from obtaining satisfaction of their claims against the debtor by removing property from their reach. In re Acequia, Inc., 34 F.3d 800, 804 (9th Cir.1994) (quoting Max Sugarman Funeral Home, Inc. v. A.D.V. Investors, 926 F.2d 1248, 1254 (1st Cir. 1991)).

Actual intent can be inferred from the conduct of the transferor. See e.g. McWilliams v. Edmonson, 162 F.2d 454 (C.C.A.5. 1947), cert. denied, 332 U.S. 835, 68 S.Ct. 216, 92 L.Ed. 408 (1947).

In addition to the non-exhaustive list of badges of fraud as set forth above, a general rule that transactions involving insiders should be closely scrutinized governs. See In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479 (4th Cir. 1992).

As the court noted in In re Acequia, 34 F.3d 800 (9th Cir. 1994) "badges of fraud" will form the basis to infer intent.

> The presence of a single badge of fraud may spur mere suspicion; the confluence of several [badges of fraud] can constitute evidence of actual intent to defraud, absent "significantly clear" evidence of supervening purpose.

In this case, there are several badges of fraud including but not limited to the following: elements:

> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the

> debtor had been sued or threatened with suit;
>
> (5) The transfer was of substantially all the debtor's assets;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

Actions taken with intent to "hinder, delay or defraud" are hardly ever susceptible of direct proof. Usually, circumstantial evidence is required, In re Agricultural Research and Technology Group, Inc., 916 F.2d 528, 534-5 (9th Cir. 1990), since only [r]arely will a debtor admit to transferring property with an actual intent to defraud creditors", In re Serrato, 214 B.R. 219, 229 (Bkrptcy N.D.Cal. 1997).

Simply acting with knowledge that the transfer will operate to the detriment of creditors is sufficient to show the requisite intent, In re Agricultural Research and Technology Group, Inc., 916 F.2d 528, 535 (9th Cir. 1990).

A judgment in the amount of $90,000.00 was entered against the Debtor on February 3, 2006, two days after the transfer of all of the debtor's assets from BIA to EBIA, a company owned and controlled by the same principals of the debtor, for no consideration.

In this case it is clear that the transfer of the entire operating business of the Debtor to Defendant EBIA was fraudulent.

D. **EBIA is a Mere Successor of the Debtor, BIA.**

> Normally, when a corporation sells its assets to another corporation, the purchasing corporation does not become liable for the debts of the selling corporation. *Hall v. Armstrong Cork, Inc.*, 103 Wash.2d 258, 261, 692 P.2d 787 (1984). The rationale for this rule is a "bona fide purchaser who gives adequate consideration and who lacks notice of prior claims against the property acquires no liability for those claims." *Hall*, 103 Wash.2d at 262, 692 P.2d 787. Four exceptions to this rule of non-liability exist. Successor liability is imposed if:
>
> > (1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability.
>
> *Hall*, 103 Wash.2d at 261-62, 692 P.2d 787. Liability may be imposed regardless of the exact form of transfer of assets between the corporations. *Stoumbos v.*

Kilimnik, 988 F.2d 949, 961 (9th Cir.1993) (applying Washington law).

In re Eagle Pacific Insurance Company v Christensen Motor Yacht Corporation, 135 Wash. 2d 894, 959 P.2d 1052 (1998).

In the present case successor liability should be imposed for either of two alternate reasons: 1) because EBIA is a mere continuation of the debtor and 2) because the transfer of the assets was for the fraudulent purpose of escaping liability.

D(2). ***EBIA is a Mere Continuation of the Debtor***

The depositions of the various employees of the debtor and of EBIA unequivocally show that BIA was in business and operating out of the BIA space on January 31, 2006 and on February 1, 2006 EBIA began its operations. EBIA did not purchase any of the assets of the debtor, it just changed the name on the door and continued as if it were BIA. EBIA paid no consideration to the debtor for its assumption of its operations. See Docket #1, answer to question number 10 on the statement of financial affairs.

The deposition testimony alone makes it crystal clear that EBIA is a mere continuation of the Debtor. EBIA (1) is operating out of the same space; (2) has the same employees, (3) has the same phone number and facsimile number as BIA, (4) operates the exact same business, (5) has the same information on its website as was on BIA's website an in fact claims that "EBIA's origins date back to 1984" (6) inherited all the work in progress. It would be virtually impossible to find a case where the new corporation took more "sticks" from the bundle of the old corporation than in this case.

D(3). ***Transfer of Assets was for Fraudulent Purpose of Escaping Liability.***

The judgment of the Arbitration Defendants was issued just two days after the cessation of BIA and the incorporation of EBIA and commencement of the EBIA business. There was no consideration paid for the transfer of all assets. After the formation of EBIA its principals did everything within their power to make sure that each and every asset of BIA was out of the name of BIA and in the name of EBIA. It is clear that the only reason EBIA was formed was escape the liability that resulted from the impending judgment in favor of the Arbitration Defendants.

V. CONCLUSION

The transfers in this case to Defendant ARIS are either fraudulent or preferential in nature and should be avoided and the trustee awarded a judgment in the amount of the transfers plus interest from the date of the transfers.

Further EBIA is nothing more than a successor of the debtor, BIA. This Court should impose successor liability for all the debts of the corporation and enter a judgment against EBIA in either the amount of the valid debs of the debtor (The claims register indicates the claims filed total $995,861.49 however all but claim numbers 1, 4 and 5 appear to be bogus. The total of claim numbers 1, 4, and 5 is $117,286.84) plus all costs of administration in this bankruptcy case and adversary proceeding or the value of the assets transferred, which appear to be at least the amount of the Pearce and BIA commissions in the amount of $373,291.28 which were deposited into the EBIA account.

Dated this 17th day of March, 2010.

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes,
WSB#19464
Attorney for Chapter 7
Trustee
Peter Arkison

Judge Thomas T. Glover
Chapter: Chapter 7
Hearing Date: April 14, 2010
Hearing Time: 9:30 a.m.
Hearing Site: Marysville Municipal Court
1015 State Avenue
Marysville, WA 98270
Response due: April 7, 2010

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Bankruptcy No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,
v.
EXECUTIVE BENEFITS INSURANCE AGENCY, et. al.,
Defendants.

DECLARATION OF MICHAEL QUACKENBUSH IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST SOLELY EBIA

MICHAEL QUACKENBUSH declares under penalty of perjury of the laws of the State of Washington as follows:

I am over the age of 21 and am competent to make this declaration and do so based upon personal knowledge.

I am the accountant for the above-referenced estate.

Attached hereto as Exhibit "1" is a true and correct copy of a Quickbooks transaction detail from commission income for the period of January 1, 2006 to June 1, 2006. I obtained these records from the debtors' principals. The exhibit shows deposits of commission income from Peter Pearce and EBIA(EDBG) into the ARIS account. There are five deposits buy Pearce totaling $122,454.30. There are 14 additional deposits into the ARIS account by EBIA for commissions it earned totaling $277,885.82. Thus the total commissions deposited into the ARIS account for commissions earned from BIA related business was $373,291.28.

Signed and dated on this 19th day of March, 2010 at Monroe, Washington.

See attached signature

Michael D. Quackenbush

There are five deposits buy Pearce totaling $122,454.30. There are 14 additional deposits into the ARIS account by EBIA for commissions it earned totaling $277,885.82. Thus the total commissions deposited into the ARIS account for commissions earned from BIA related business was $373,291.28.

Signed and dated on this 17th day of March, 2010 at Monroe, Washington.

/s/Michael D. Quackenbush

Michael D. Quackenbush

12:44 PM
04/27/08
Cash Basis

A.R.I.S. Inc
Transactions by Account
As of December 31, 2008

Type	Date	Num	Name	Memo	Clr	Split	Original Amount	Paid Amount	Balance
1235 · Intercompany E.B.I.A. (Intercompany E.B.I.A.)									0.00
Deposit	3/18/2008	0101	Peter E. Pearce	Deposit		1027 · Checkin...	-11,800.00	-11,800.00	-11,800.00
Deposit	3/21/2008	1002	Peter E. Pearce	peter pearce s...		1027 · Checkin...	-60,660.31	-60,660.31	-62,460.31
Deposit	4/10/2008	1007 ...	Peter E. Pearce	Prin. checks $...		1027 · Checkin...	-60,008.89	-60,008.89	-122,464.20
Deposit	5/3/2008	0101	Executive Benefits D...	sec & admin		1027 · Checkin...	-70,888.89	-70,888.89	-193,391.19
Deposit	5/11/2008	0102	Executive Benefits D...	sec & admin		1027 · Checkin...	-32,875.91	-32,875.91	-226,267.10
Deposit	5/11/2008	1017	Peter E. Pearce	Deposit		1027 · Checkin...	-643.35	-643.35	-226,910.45
Deposit	5/16/2008	1018	Peter E. Pearce	Deposit		1027 · Checkin...	-38.93	-38.93	-226,949.38
Payment	6/6/2008	1000	Executive Benefits D...	Design Fee		1499 · Undepo...	-17,380.00	-17,380.00	-244,298.38
Payment	6/6/2008	1000	Executive Benefits D...	travel		1499 · Undepo...	-647.46	-647.46	-244,943.84
Payment	7/11/2008		Executive Benefits D...			1499 · Undepo...	-13,484.68	-13,484.68	-258,128.52
Deposit	7/18/2008	1000	Executive Benefits D...	Occupancy & ...		1027 · Checkin...	-28,462.76	-28,462.76	-286,591.28
Deposit	8/13/2008	1008	Executive Benefits D...	Transfer for r...		1027 · Checkin...	-27,000.00	-27,000.00	-310,591.28
Deposit	10/8/2008	1008	Executive Benefits D...	Transfer fund...		1027 · Checkin...	-1,800.00	-1,800.00	-312,091.28
Deposit	10/13/2008	1009	Executive Benefits D...	Transfer fund...		1027 · Checkin...	-5,200.00	-5,200.00	-317,291.28
Deposit	10/17/2008	1010	Executive Benefits D...	Transfer for r...		1027 · Checkin...	-43,000.00	-43,000.00	-360,291.28
Deposit	12/1/2008		Executive Benefits D...	Transfer for r...		1027 · Checkin...			-360,291.28
Deposit	12/1/2008		Executive Benefits D...	Transfer for r...		1027 · Checkin...	-4,000.00	-4,000.00	-364,291.28
Deposit	12/28/2008		Executive Benefits D...	Transfer for r...		1027 · Checkin...	-9,000.00	-9,000.00	-373,291.28
General Journal	12/31/2008		Executive Benefits D...	Intercompany ...		3999 · Retains...	-373,291.28	373,291.28	0.00
Total 1235 · Intercompany E.B.I.A. (Intercompany E.B.I.A.)								0.00	0.00
TOTAL								0.00	0.00

Case 08-01132-KAO Doc 47 Filed 03/19/10 Ent. 03/19/10 16:08:00 Pg. 4 of 4

Hon. Thomas T. Glover

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

In re: BELLINGHAM INSURANCE AGENCY, INC., Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A Washington Corporation, and A.R.I.S. And, NICHOLAS PALAVEDA and MAJORIE EWING, and PETER PEARCE and JANE DOE PEARCE, Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

SUMMARY

The issue in this motion is whether successor liability should attach to Executive Benefits Insurance Agency, doing business as Executive Benefits Design Group ("EBDG") to answer for the debts of the Bellingham Insurance Agency, doing business as The421iCompany ("412i") because: (1) 412i's former insurance agent may have transferred some of his insurance commissions to ARIS, a pension administration company, and ARIS may have erroneously credited those deposits to EBDG, even though EBDG did not owe ARIS any money at the time of the alleged trans-

fers; (2) EBDG took over the physical facilities once occupied by 412i; and (3) former employees of 412i work for EBDG, though the ownership of EBDG is completely different.

DISPUTED AND UNDISPUTED FACTS

The plaintiff-trustee has not submitted a separate statement of undisputed facts, as required by Local Bankruptcy Rule 7056-1(b). Therefore, the responding party is unable to point out to the Court specific facts which are contended by the trustee to be uncontroverted, but which are in fact in dispute, as called for by subsection (b)(3) of the Rule. Nonetheless, this memorandum will demonstrate that the factual claims of the Motion for Summary Judgment are highly controverted. EBDG will reply to the factual assertions of the Trustee, using the paragraph numbers assigned by the Trustee:

1.1. 412i filed for bankruptcy after it had become insolvent when all of the funds had been taken out of the company to pay claimed bonuses and, later, a further judgment of costs awarded in arbitration against 412i. (Declaration of Nicholas Paleveda In Opposition To Motion For Summary Judgment ("Paleveda Dec.") ¶¶ 4-5.) According to the testimony of auditor Michael Quackenbush, 412i was insolvent by the end of 2005. (Declaration of Donald A. Bailey, Attached Deposition of Michael Quackenbush ("Quackenbush Dep."), at 52.)

1.2. EBDG agrees with the Trustee that 412i was involved in the insurance business, and in a niche market selling 412(i) retirement plans and, in fact, specialized almost exclusively in those plans. (Declaration of Deniece Moewes, Exhibit 1, Attached Deposition of John Bremer ("Bremer Dep.") at 11). By comparison,

EBDG offers a far wider variety of pension products and services. (Paleveda Dec. ¶¶ 12, 17, 20, 23.) Thus EBDG reflects a fundamentally different philosophy and approach from that pursued by 412i. Id. ¶ 12.

1.3. EBDG agrees that The412iCompany was a trade name for the Bellingham Insurance Agency.

1.4. EBDG agrees that Marjorie Ewing owned approximately eighty percent of 412i and that Charles Gramp owned approximately ten percent. Five other owners owned the remaining amount. Nicholas Paleveda was never an owner of 412i, but is the sole owner of EBDG. (Paleveda Dec. ¶ 12.)

1.5. EBDG agrees that 412i provided pension plan marketing services and that ARIS provided plan design and maintenance services. (Paleveda Dec. ¶ 6.)

1.6. EBDG agrees that it was necessary to keep marketing and plan design and maintenance services separate and, thus, it was necessary for ARIS and 412i to be separate companies.

1.7. EBDG agrees that Nicholas Paleveda was President of 412i during most of its existence, but does not agree that Mr. Paleveda was the sole director. In fact, there were a number of other officers, shareholders and directors. The other directors held a meeting without him present to vote themselves bonuses that rendered the company insolvent. (Paleveda Dec. ¶¶ 4-5, 17.)

1.8. EBDG agrees that ARIS and 412i shared a suite of offices until 412i ceased operating.

1.9. EBDG agrees that it was organized as a Delaware corporation.

1.10. EBDG agrees that 412i ceased to operate after it became insolvent. However, it does not agree that Sarah Pearce has an understanding of the inner-workings of company matters or that she was an officer or director of any company. (Paleveda ¶ 13.)

1.11. EBDG agrees that it operated for awhile in the same space that 412i operated in. However, the Trustee makes far too much of this connection. EBDG's President explains that this location is not used to meet with clients and has little or no role in marketing.

> It is true that EBDG took over some of the office space that had been leased to 412i, though it later moved to a different floor of the same building. However up on the 4th floor was 10,000 square feet and 34 offices, many offices sub-let by Neighborhood mortgage, Vibrant USA and others using the common space. There was vacant space as well. I was aware that the space was available, that it was in the same building as ARIS and would facilitate a good working relationship with ARIS. I knew the management of the building and was comfortable that the arrangements would be suitable. EBDG did NOT assume the space in order to make people believe that EBDG was a mere continuation of 412i. In fact, during the entire time that 412i was in business, I do not recall ever meeting with a client in the office. The same is true regarding EBDG. Both companies

> marketed nationwide, and consultations with clients have typically been done by telephone. The fact that EBDG operates out of the same office space vacated by 412i would not even register with most clients.

(Paleveda Dec. ¶ 18.) EBDG gained little to no marketing advantage by being in the same space as 412i had been.

1.12. EBDG disagrees that it simply continues with no difference from 412i. For one thing, the fundamental ownership and management structure is completely different:

> After 412i was forced to dissolve, I was essentially out of a job. While I still maintain a small federal tax litigation law practice, that was far from a full time job. I, therefore, decided to start two new companies. Based on my experience as a pension attorney and CEO of 412i, and my insurance industry connections, I decided to start a company named Executive Benefits Insurance Agency, doing business as Executive Benefits Design Group ("EBDG"). Executive Benefits was formed in Delaware with myself as the sole shareholder, unlike Bellingham Insurance Company 412i, which is a Washington company with 7 shareholders and of which I was never a shareholder. The 412(i) Company promotes one plan, a 412(i) plan. Executive Benefits promotes many different types of plans including

> 401(k), profit sharing plans, non-qualified plans and traditional defined benefit plans. I also started a company known as Vex Video to promote videos over the internet. Vex had several common employees that worked for Executive Benefits and some which only worked for Vex.

(Paleveda Dec. ¶ 10.) Vex Video, a company unrelated to the pension business also operated from the same suite off offices. Mr. Paleveda chose to locate it there because it was convenient to his other businesses and because he was comfortable with the arrangements.

The Trustee also misleadingly states that "In fact the only change was the name change from BIA to EBIA." These acronyms, which were never used in the real world, are used in the Trustee's motion to make the names of the two companies seem very similar when in fact they are not similar at all, as Mr. Paleveda explains:

> Incidentally, the Trustee continues to use the acronyms "BIA" and "EBIA" to describe two companies with which I have been affiliated, apparently to suggest that EBIA is using almost the same name as BIA did, and to suggest that I created the impression with the public that they were essentially the same company. This is terribly misleading. In the first place, neither of these companies has ever used either of these acronyms other than during litigation for convenient reference in court documents. Secondly, when answering the phone and otherwise in mar-

> keting efforts, BIA was held out to the public as "The412iCompany" and EBIA was held out to the public as "Executive Benefits Design Group." These names are not in any way similar. The only reason that the legal name of both companies included the words "Insurance Agency" was that the State of Texas requires insurance agencies to use those words in their company names to sell insurance in Texas. Thus, both companies were registered with legal names including the words "Insurance Agency" to satisfy the law in Texas, but operated under "doing business as" names in order to permit the company names to more accurately reflect the missions of the companies themselves. This Court should not be confused into thinking that the two companies were using similar names to support the idea that EBDG is a "mere continuation" of 412i. The two names under which the companies held themselves out to the public are very different. (Even the legal names "Bellingham Insurance Agency" and Executive Benefits Insurance Agency" are not terribly similar when the acronyms are not used—which they never have been outside litigation.)

(Paleveda Dec. ¶ 11.) Contrary to the impression created by the Trustee, the names by which the two relevant companies were held out to the public were absolutely nothing alike.

1.13. EBDG agrees that arbitration took place between 412i and Hess, Farrington, and Price.

1.14. EBDG agrees that Arbitrator Scott Easter (incorrectly) ruled in favor of the arbitration Defendants, upholding the alleged bonus program, including an award of costs.

1.15. EBDG agrees that the Arbitrator (incorrectly) awarded attorney fees against 412i.

This was a major factor in driving 412i into insolvency. (Paleveda Dec. ¶¶ 5, 7.)

1.16. EBDG agrees that 412i was unsuccessful in challenging the arbitration award.

1.17. EBDG agrees that ANICO was a significant source of revenue for 412i.

1.18. EBDG agrees that, as agent, Peter Pearce revoked his assignment of ANICO commissions to 412i, in the same manner that Charles Farrington had revoked his assignment of commissions to 412i. (Paleveda Dec. ¶ 8.) As Mr. Paleveda testified:

> Contrary to the Trustee's assertions, EBDG has not received and is not receiving commissions from 412i renewals. My original position was that such commissions were the property of the bankruptcy estate. However, I lost that argument when Mr. Farrington revoked his assignment of commissions and claimed that the commissions belonged to him personally. He was upheld in so doing by this Court. Peter Pearce also revoked his assignment

> of commissions. Mr. Pearce apparently also owns his commissions.

(Paleveda Dec. ¶ 16.) EBDG did not get Mr. Pearce's commissions.

1.19. Same response as Paragraph 1.18.

1.20. EBDG agrees that Peter Pearce was the licensed insurance agent employed by 412i, and that Mr. Paleveda believed that Mr. Pearce was a pass-through to enable 412i to receive commissions as the Trustee argued. However, he also believed that about Mr. Farrington as discussed in the reply to Paragraph 1.18 above. But he lost that argument when Mr. Farrington was permitted to keep his commissions instead of returning them to the bankruptcy estate as property of the company.

1.21. Same response as the previous three paragraphs.

1.22. Whether Mr. Pearce deposited commission checks with ARIS, EBDG did not benefit from this. As Mr. Paleveda testified:

> I do not know whether Peter Pearce deposited any of his commissions into the ARIS account. The trustee claims that this money was credited to EBDG in Quickbooks. If this is true, it is a clerical error. EBDG did not owe ARIS any money before May of 2010, and would not have benefitted by getting credit for Mr. Pearce's deposit. I do not know who made these alleged entries in ARIS's Quickbooks records or what that person was thinking when they did so. I simply

> know that EBDG did not receive any benefit for being credited with a deposit of funds owned by Peter Pearce to ARIS. Even if Mr. Pearce did submit funds that he owned into EBDG's accounts, this does not support the idea that EBDG was a mere continuation of 412i.

(Paleveda Dec.¶ 22.) Mr. Paleveda's testimony is unequivocal that EBDG did not receive any money or payment of any debt based on Peter Pearce's 412i commissions.

1.23. EBDG disagrees that it deposits commission checks with ARIS, but agrees that it has paid fees to ARIS for plan design services and has shared certain overhead expenses with ARIS.

> 412i's practice was not to deposit commission checks with ARIS. It is, in fact, illegal to share commissions with an unlicensed entity. 412i would have to deposit the commission in its own accounts and then issue a payment to ARIS for its services in a way that was unrelated to the commission. EBDG follows the same policy. I would not knowingly permit a commission check over which I had control to be deposited with ARIS or any other plan administration company.

(Paleveda Dec. ¶ 22.)

1.24. EBDG agrees that it would be impossible for a brand new company to generate commissions immediately. That was true of EBDG as well. Although it began seeking new business at the beginning of the

year in 2006, it did not receive its first commission checks until May 2006, more than four months later. (Paleveda Dec. ¶¶ 14, 21.)

1.25. EBDG agrees that the 412i website was taken down and that EBDG started a new website with a new domain name to advertise its services. EBDG disagrees that it was the same website, but included different information, a different company logo, and an entirely different domain name. (Paleveda Dec. ¶ 23.)

1.26. EBDG agrees that it operated for awhile in the same space that 412i operated in. However, this concern is overblown as discussed in the response to Paragraph 1.11 above.

EBDG agrees that it is a duly licensed insurance agency and that Peter Pearce is its duly licensed insurance agent. EBDG further agrees that, at one time, Mr. Pearce was the duly licensed insurance agent for 412i. However he had resigned that position prior to being employed as the duly licensed agent for EBDG. He has not provided commissions that he earned at 412i to EBDG.

The Trustee attempts to tie 412i and EBDG by stating that both had relationships with ANICO and Principal Financial. Given the small number of insurance companies (about 18) in the industry, this is allegation is something like suggesting that one company is the successor of another because both used Microsoft Windows software. However, considering the small universe of providers, there is a wide difference between the insurance providers used by the two companies at issue in this case, reflecting the difference in philosophy between the two companies. (Paleveda Dec. ¶ 20.)

1.27. EBDG agrees that the Arbitration Defendants filed a fraudulent transfer action. However, there is no evidence that there was actually a transfer of any tangible asset from 412i to EBDG.

1.28. EBDG agrees that the Arbitration Defendants asked for a restraining order.

1.29. EBDG agrees that the Superior Court issued a temporary order preventing EBDG from transferring assets traceable to assets of 412i. EBDG further clarifies that it did not receive commissions or other assets of 412i, and there is no evidence to the contrary. (Paleveda Dec. ¶¶ 21, 23.)

1.30. EBDG agrees that 412i filed for bankruptcy. 412i's agreements with insurance companies provided that when it filed for bankruptcy, its agreements with the companies terminated. (Paleveda Dec. ¶ 7.) Thus, when 412i was forced into bankruptcy, it could no longer do business with the insurance industry.

ARGUMENT

A. There Was No Voidable Transfer to EBDG

The trustee asserts that all of the assets of the debtor were transferred to EBDG for less than equivalent value, but nowhere states what these assets were or how they were transferred. In the entire subsection C of the Trustee's memorandum, there is not a single reference to any asset that was transferred from 412i to EBDG, except the bare, unsupported assertion that all of 412i's assets had been transferred to EBDG. The vast majority of those assets are unsellable human capital such as employees and business relationships.

As stated by the Trustee, 11 U.S.C. § 548(a)(2) permits the Trustee of a Debtor to avoid transfers made within one year before the date of filing of the petition if the Debtor received less than reasonably equivalent value in exchange for the transfer and was insolvent on the date such transfer was made. The evidence presented shows no transfer of any tangible asset to EBDG. The Trustee's argument in Part IV of his memorandum does not identify a single asset that was illegally transferred. It merely suggests that all of the assets of 412i were transferred. The Trustee states that "The transfers at issue occurred on February 1, 2006," the date the Trustee alleges that EBDG began operating. (Plaintiff's Memorandum In Support Of Plaintiff's Motion For Summary judgment On Plaintiffs Complaint To Recover Fraudulent Transfers Solely As To Defendant Executive Benefits Insurance Agency, Inc. ("Pl's Br."), at 14.)

The identified assets that EBDG received consist of a telephone number, a lease arrangement for an office that no clients visited, and the opportunity to follow up on some sales leads. These "assets" do not fall within the meaning of the fraudulent transfer prohibitions cited by the Trustee:

> The rules established in the avoidable preference cases are applicable to a certain extent in the context of fraudulent transfers. The purpose of avoidance of both types of transfers is to prevent a debtor from diminishing, to the detriment of some or all creditors, funds that are generally available for distribution to creditors. Consequently, any funds under

> the control of the debtor, regardless of the source, are properly deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance.

In re Chase & Sanborn Corp., 813 F.2d 1177 (11th Cir. 1987). Taking over the office space lease, the telephone number, the website (which did not happen), unfinished sales work (which also did not happen), and some employees of a former company do not represent funds that could have been distributed to creditors.

B. EBDG is Not a Mere Continuation of 412i

The Trustee's argument that EBDG is a mere continuation of 412i amounts to the following six claims:

> [EBDG] (1) is operating out of the same space; (2) has the same employees, (3) has the same phone number and facsimile number as [412i], (4) operates the exact same business, (5) has the same information on its website as was on [412i]'s website and in fact claims that "[EBDG]'s origins date back to 1984" (6) inherited all the work in progress.

(Pl's Br. at 21.) However, the analysis does not properly begin with whether the EBDG continues some or all of the functions of 412i. "Mere continuation" analysis is only appropriate where one company has essentially purchased all of the assets of another:

> Washington adheres to the general rule that a corporation purchasing the assets of another corporation does not become

> liable for the debts and liabilities of the selling corporation. Hall v. Armstrong Cork, Inc., 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984). An exception to this rule may exist, however, where (1) there is an express or implied agreement for the purchaser to assume liability; "(2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability." Id. at 262.

Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 481-82 (2009) emphasis supplied); Martin v. Abbott Labs., 102 Wn.2d 581, 609 (1984). Before engaging in analysis of whether one company is a "mere continuation" of another, the Court should first determine if that corporation is a purchasing corporation. It is important that this Court understand, at the outset, that EBDG's position is that it was not a purchaser of 412i's assets. Regardless of whether the above-stated exceptions to the general rule apply, there was no transfer of assets between 412i and EBDG in the first place. The Declaration of Michael Quackenbush shows transfers of Peter Pearce to ARIS and, later, from EBDG to ARIS, but does not even allege transfers of any funds or other assets from 412i to EBDG or from ARIS to EBDG. (Declaration Of Michael Quackenbush In Support Of Plaintiffs Memorandum In Support Of Plaintiffs Motion For Summary Judgment Against Solely EBIA ("Quackenbush Dec.").)

A company is not a "mere continuation" of another merely because it is engaged in a similar busi-

ness. Proof of a "mere continuation" claim requires proof that a business has tried to avoid liability "merely by changing hats." This requires, at a minimum, a common identity of officers, directors, and shareholders, and insufficient consideration for transferred assets:

> The mere continuation theory is designed to prevent the corporation from escaping liability "by merely changing hats". 15 W. Fletcher § 7124.10, at 292. See also Baltimore Luggage Co. v. Holtzman, 80 Md. App. 282, 562 A.2d 1286, 1293 (1989), cert. denied, 318 Md. 323, 568 A.2d 28 (1990). Washington courts have indicated that to prevail on the theory of "mere continuation", proof of at least two elements is required. The first element is "a common identity of the officers, directors, and stockholders in the selling and purchasing companies." Cashar v. Redford, 28 Wn. App. 394, 397, 624 P.2d 194 (1981); accord, Long v. Home Health Servs. of Puget Sound, Inc., 43 Wn. App. 729, 735, 719 P.2d 176, review denied, 106 Wn.2d 1012 (1986). The second element is "the sufficiency of the consideration running to the seller corporation in light of the assets being sold." Cashar, at 397; accord, Long, at 736.

Gall Landau Young Constr. Co. v. Hedreen, 63 Wn. App. 91, 96-97 (1991). The Trustee's claim that EBDG is a purchasing corporation is based on the fact that EBDG took over a lease of office space, a telephone

number and, perhaps, some work in progress. Even if these claims were true, this is not a transfer of assets supporting a claim of successor liability. The purpose of the "mere continuation" theory is to ensure that assets are not transferred to a new company to the detriment of the old corporation's creditors:

> The requirement of inadequate consideration in a successor liability case is premised on the notion that when a successor corporation acquires the predecessor's assets without paying adequate consideration, the successor deprives the predecessor's creditors of their remedy. Where the predecessor files bankruptcy and its debts are discharged, however, it is the discharge and the lack of sufficient assets that deprive the predecessor's creditors of their remedy, not the acquisition of the predecessor's assets by another entity, in this case for more than their appraised value. See Monarch Bay II v. Prof'l Serv. Indus., Inc., 75 Cal. App. 4th 1213, 89 Cal.Rptr.2d 778, 780 (Cal. Ct. App. 1999) (indicating that there must be a causal relationship between a successor's acquisition of assets (i.e., inadequate consideration), and the predecessor's creditors' inability to get paid). The district court clearly erred in finding that M-MLS.com was the mere continuation of M-MLS, Inc. where there is no evidence that M-MLS.com acquired M-MLS, Inc.'s assets for inadequate consideration.

Katzir's Floor & Home Design v. Sommer, 394 F.3d 1143, 1151 (9th Cir. 2004). Assumption of an office lease, a telephone number, and any work in progress (none was transferred despite the Trustee's allegations), did not deprive creditors of a remedy. None of those items had sellable value. The insolvency and bankruptcy of 412i alone was responsible for depriving the creditors of their remedy. The Courts of Washington have adopted the same rule:

> Alad requires more than that the predecessor be nonsuable. The first prong of the Alad test requires that "the virtual destruction of the plaintiff's remedies against the original manufacturer [be] caused by the successor's acquisition of the business." . . . In other words, the very terms of Alad require an element of causation; a successor corporation cannot be held liable for the product liability torts of its predecessor unless there is a showing that the successor caused -- or at least contributed to -- the plaintiff's inability to recover against the predecessor.

Hall v. Armstrong Cork, 103 Wn.2d 258, 267 (1984) (emphasis supplied). There is nothing in EBDG's leasing the former offices of 412i, using a common telephone number, and hiring some of 412i's employees that caused 412i to be unable to meet its obligations to creditors. By the time EBDG was created, 412i's assets had been depleted by the bonus scheme.

Even assuming for the sake of discussion that EBDG was somehow a purchaser of 412i's assets, it is not a mere continuation of 412i's business. The Trustee

first suggests that the location of EBDG's operations in the same space as 412i had operated proves that EBDG is a mere continuation of 412i. The Trustee admits that no assets were transferred, but alleges that "[EBDG] did not purchase any of the assets of the debtor, it just changed the name on the door and continued as if it were [412i]." (Pl's Br. at 21.)

As indicated elsewhere in this memorandum, EBDG worked to develop its own customers. The fact that EBDG took over the space vacated by 412i is of little consequence. As explained by EBDG's President:

> It is true that EBDG took over some of the office space that had been leased to 412i, though it later moved to a different floor of the same building. However up on the 4th floor was 10,000 square feet and 34 offices, many offices sub-let by Neighborhood mortgage, Vibrant USA and others using the common space. There was vacant space as well. I was aware that the space was available, that it was in the same building as ARIS and would facilitate a good working relationship with ARIS. I knew the management of the building and was comfortable that the arrangements would be suitable. EBDG did NOT assume the space in order to make people believe that EBDG was a mere continuation of 412i. In fact, during the entire time that 412i was in business, I do not recall ever meeting with a client in the office. The same is true regarding EBDG. Both companies

> marketed nationwide, and consultations with clients have typically been done by telephone. The fact that EBDG operates out of the same office space vacated by 412i would not even register with most clients.

(Paleveda Dec. ¶ 18.) The vacant building was simply a convenient space for EBDG's owner and President to operate when he began his company. It resulted in absolutely no marketing advantage. EBDG's use of the same telephone number as 412i was to facilitate the sharing of that number and receptionist services with ARIS, Vex Video, and Mr. Paleveda's private law practice. Id. ¶ 19. This Court did not grant summary judgment against ARIS, despite the sharing of office space, a phone number, staff and reception services with the debtor. EBDG should not be found liable for 412i's debts on that basis either.

The Trustee alleges that EBDG "inherited all the work in progress" from 412i. However, Mr. Paleveda has testified that:

> [V]ery few, if any, of the end-user clients of EBDG are the same as those of 412i. This is so partly because insurance plans include surrender fees if the client chooses to switch to another insurance agency. It doesn't make sense for the client to pay those fees simply to give his/her commissions to a different company. Thus, I do not feel that it would be ethical for me to attempt to re- solicit those customers on behalf of EBDG when it is not to their advantage to change to a different agency.

> Thus, EBDG has generated new clients, rather than trying to solicit clients previously enrolled by 412i.

(Paleveda Dec. ¶ 15.) EBDG did not inherit the right to insurance commissions or other work begun by 412i. The idea that EBDG simply picked up where 412i left off is simply inaccurate:

> The Trustee alleges that 412i ceased business on January 31, 2006 and that EBDG began operating the following day to support the idea that EBDG just sort of picked up where 412i left off. In fact EBDG did not open a bank account or deposit any money into an EBDG account of any kind until early May of 2006. Prior to May, EBDG was establishing relationships with insurance companies, signing its own contracts and appointing its own independent agents and attempting to solicit its own business. However, this did not result in any revenue until May.

Id. ¶ 14. EBDG was a completely new business. It developed new customers. It did not collect commissions on any plans sold by 412i and did not make any money until it began collecting commissions for the business it had developed for itself. There was a period of four months following the creation of EBDG before it was able to earn any revenue. The Trustee argues that "it was not possible for EBIA to commence business on February 1, 2006 and generate commissions this quickly so the funds had to be commissions that belonged to BIA[.]" Mr. Quackenbush's testimony demonstrates that EBDG did not begin paying ARIS fees for plan de-

sign until May 3, 2006. (Quackenbush Dec., Exhibit 1.) However, the evidence is that it actually took several months from the founding of EBDG to begin generating commissions, because EBDG had to solicit new customers. EBDG's President testified that "Contrary to the Trustee's assertions, EBDG has not received and is not receiving commissions from 412i renewals." Id. ¶ 16.

In another Washington case where two companies shared common officers and directors and the second company inherited management contracts from the first, the second company was found not to be a continuation where those contracts were terminable:

> The parties do not dispute that the officers, directors, and stockholders in Parkside and R.C. Hedreen shared a common identity. However, R.C. Hedreen challenges the trial court's conclusions of law as to the remaining elements. R.C. Hedreen contends that the court erred in determining the value of the management contracts transferred from Parkside to R.C. Hedreen. He argues that the court should have applied a fair market value standard, based on what a willing buyer would buy and what a willing seller would sell on the date the assets were transferred. We agree. Hedreen's right to terminate the contracts within 90 days made their present cash value negligible. Even GLY's expert testified that he would pay "little if anything" as a down payment for the con-

> tracts. The purpose of the mere continuation theory is to render ineffective a transfer of the debtor corporation's assets when those assets could have been used to satisfy the corporation's debts. In the case at bar, it is difficult to conceive of how the management contracts could have satisfied GLY's debts when the profits would be gleaned only in the future and Hedreen could exercise his power of termination within 90 days.
>
> We conclude that the trial court erred in finding that the management contracts had significant value. Since the management contracts had no significant value and comprised the only assets transferred, insufficient consideration running to Parkside and transfer of substantially all of Parkside's assets cannot be proved. Parkside's inability to meet its obligations to its creditors did not result from the transfer of the management contracts to R.C. Hedreen. Therefore, no equitable principle would be served in finding R.C. Hedreen to be a mere continuation of Parkside. See Armour-Dial, Inc. v. Alkar Eng'g Corp., 469 F. Supp. 1198, 1202 (E.D. Wis. 1979), cited in 15 W. Fletcher § 7125 n.6. n5

Gall Landau Young Constr. Co. v. Hedreen, 63 Wn. App. 91, 98-99 (1991). The present case is even clearer. While there are some employees and officers that worked for both 412i and EBDG, there were absolutely

no contracts of any kind transferred from 412i to EBDG. EBDG developed all of its own new business. Even if the Trustee's assertions were correct, inheriting prospective sales leads and other "work in progress" is of less value than inheriting legal contracts and known customers—even if those contracts are terminable.

With respect to the claim that EBDG is operating the "exact same business" as 412i did, this is simply inaccurate. EBDG operates under a different philosophy and marketing approach. As the President of EBDG testified:

> When I started EBDG, I was interested in offering a wider variety of pension plans than had been offered at 412i. (412i specialized in selling 412i pension products and very little else.) EBDG offers 401k products, non-qualified deferred compensation plans, and a variety of other pension products that were not offered by 412i. This reflects a fundamentally different philosophy from that pursued by 412i. 412i's approach was to sell a single product. EBDG's approach is to be more flexible and provide assistance to the client in selecting the best product for that client among a broad range of alternatives.

(Paleveda Dec. ¶ 12, 17, 20.) EBDG offers a far wider variety of products than 412i did. Additionally, while it is true that EBDG employs a number of the same people and is lead by the same CEO as 412i was, the ownership structure is entirely different:

> After 412i was forced to dissolve, I was essentially out of a job. While I still maintain a small federal tax litigation law practice, that was far from a full time job. I, therefore, decided to start two new companies. Based on my experience as a pension attorney and CEO of 412i, and my insurance industry connections, I decided to start a company named Executive Benefits Insurance Agency, doing business as Executive Benefits Design Group ("EBDG"). Executive Benefits was formed in Delaware with myself as the sole shareholder, unlike Bellingham Insurance Company 412i, which is a Washington company with 7 shareholders and of which I was never a shareholder. The 412(i) Company promotes one plan, a 412(i) plan. Executive Benefits promotes many different types of plans including 401(k), profit sharing plans, non-qualified plans and traditional defined benefit plans. I also started a company known as Vex Video to promote videos over the internet. Vex had several common employees that worked for Executive Benefits and some which only worked for Vex.

(Paleveda Dec. ¶ 10.) Mr. Paleveda was an officer and never a shareholder in 412i, whereas he is the sole owner and director of EBDG. It is also important to note that, because of its wider variety of product offerings, EBDG does business with a number of insurance companies that 412i had no contracts with. Id. ¶ 20.

EBDG is a new company and not a mere continuation of 412i. It has different ownership than 412i. It offers a wider variety of products than 412i. It does business with a wider group of insurance companies than 412i. It has developed virtually all new customers that were not customers of 412i. It is not receiving and has not received funds belonging to 412i, nor has it benefited from 412i's marketing.

CONCLUSION

The Trustee's Motion for Summary Judgment should be denied.

DATED this 9th day of April 2010.

TEICHERT LAW OFFICE, PC

/s/ Jeffrey B. Techert
Jeffrey B. Teichert, WSBA #29826
Attorney for Executive Benefits Insurance Agency

Hon. Thomas T. Glover

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Bankruptcy No. 06-11721

In re: BELLINGHAM INSURANCE AGENCY, Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A Washington Corporation, and A.R.I.S. Inc., A Washington Corporation, Defendants.

DECLARATION OF NICOLAS PALEVDA

I, Nicholas Paleveda, hereby declare as follows:

1. I am Nicholas Paleveda. I serve as President and Chief Executive Officer of the Executive Benefits Insurance Agency, doing business as the Executive Benefits Design Group ("EBDG").

2. I am over the age of eighteen years and make this declaration upon personal knowledge.

3. I was, at one time, President and CEO of the Bellingham Insurance Agency, doing business as The 412(i) Company ("412i").

4. The litigation underlying this matter involved a dispute over alleged promises of bonuses with

Paul Hess, Glen Price, Charles Farrington, and Douglas Farrar, who mere members of the Board of Directors of "412i". These board members held a secret board meeting on July 24, 2003, without inviting me, as CEO. In that meeting, they voted themselves bonuses in the aggregate amount of $146,181.90, plus a commission check from Lafayette Life Insurance that was paid directly to Mr. Farrington and not to 412i. In arbitration, the aforementioned directors were permitted to keep the money that they had taken, and awarded costs in the amount of $98,278.09. The funds to pay these bonuses were diverted to a secret bank account of which I was not aware and paid out to the employees claiming bonuses.

5. While this bankruptcy is not the proper venue to re-litigate the validity of the bonuses, it is important to briefly recount the foregoing history to explain that the loss of these funds rendered 412i insolvent, whether the bonuses were proper or not. That amount of money would have kept 412i solvent. The loss of that money virtually emptied 412i's bank accounts, rendering 412i insolvent, and making it impossible for 412i to continue in business.

6. 412i made its money by receiving commissions from insurance companies for the sale and renewal of insurance and pension annuity plans. 412i did this by working with independent agents who sold the plans to the end users. Once the plans were sold, they were administered by a separate company known as "ARIS." ARIS earned its money by charging plan design and administration fees.

7. After 412i lost its legal challenges to the alleged bonus scheme that rendered it insolvent, 412i

had no way to continue to meet payroll and pay the judgments against it, and declared Chapter 7 bankruptcy. 412i's contracts with the insurance companies provided that the agreements automatically terminated if 412i filed for bankruptcy. True and accurate copies of the relevant portions of these contracts, obtained from the custodian of these documents (Marjorie Ewing), are attached hereto as Attachment 1. Because all of 412i's agreements with insurance companies were terminated upon filing for bankruptcy, 412i could no longer continue in the insurance business.

8. Furthermore, when 412i ceased business operations at the end of January 2006, 412i's registered agent, Peter Pearce, resigned from 412i and revoked his assignments of commissions. One contract was a Company contract. The others were the personal contracts of Peter Pearce. Thus, the company no longer had an insurance agent to license the company or receive commissions on its behalf.

9. After 412i declared bankruptcy, it lost all of its contracts with insurance companies as discussed in Paragraph 7 above. That meant that it could no longer sell their insurance or other pension products or receive their commissions either for sales or renewals.

10. After 412i was forced to dissolve, I was essentially out of a job. While I still maintain a small federal tax litigation law practice, that was far from a full time job. I, therefore, decided to start two new companies. Based on my experience as a pension attorney and CEO of 412i, and my insurance industry connections, I decided to start a company named Executive Benefits Insurance Agency, doing business as Executive Benefits Design Group ("EBDG"). Execu-

tive Benefits was formed in Delaware with myself as the sole shareholder, unlike Bellingham Insurance Company 412i, which is a Washington company with 7 shareholders and of which I was never a shareholder. The 412(i) Company promotes one plan, a 412(i) plan. Executive Benefits promotes many different types of plans including 401(k), profit sharing plans, non-qualified plans and traditional defined benefit plans. I also started a company known as Vex Video to promote videos over the internet. Vex had several common employees that worked for Executive Benefits and some which only worked for Vex.

11. Incidentally, the Trustee continues to use the acronyms "BIA" and "EBIA" to describe two companies with which I have been affiliated, apparently to suggest that EBIA is using almost the same name as BIA did, and to suggest that I created the impression with the public that they were essentially the same company. This is terribly misleading. In the first place, neither of these companies has ever used either of these acronyms other than during litigation for convenient reference in court documents. Secondly, when answering the phone and otherwise in marketing efforts, BIA was held out to the public as "The 412(i) Company" and EBIA was held out to the public as "Executive Benefits Design Group." These names are not in any way similar.

The only reason that the legal name of both companies included the words "Insurance Agency" was that the State of Texas requires insurance agencies to use those words in their company names to sell insurance in Texas. Thus, both companies were registered with legal names including the words "Insurance Agen-

cy" to satisfy the law in Texas, but operated under "doing business as" names in order to permit the company names to more accurately reflect the missions of the companies themselves. This Court should not be confused into thinking that the two companies were using similar names to support the idea that EBDG is a "mere continuation" of 412i. The two names under which the companies held themselves out to the public are very different. (Even the legal names "Bellingham Insurance Agency" and Executive Benefits Insurance Agency" are not terribly similar when the acronyms are not used- which they never have been outside litigation.)

12. Although I was the CEO of 412i, I was never an owner of that company. At EBDG I am the CEO, but also the sole owner of the company. When I started EBDG, I was interested in offering a wider variety of pension plans than had been offered at 412i. (412i specialized in selling 412i pension products and very little else.) EBDG offers 401k products, non-qualified deferred compensation plans, and a variety of other pension products that were not offered by 412i. This reflects a fundamentally different philosophy from that pursued by 412i. 412i's approach was to sell a single product. EBDG's approach is to be more flexible and provide assistance to the client in selecting the best product for that client among a broad range of alternatives.

13. The Trustee quotes Sarah Pearce for a number of factual circumstances of which she did not have direct knowledge. While Sarah is a conscientious and honest person in my experience, she is not an officer or director in the company. She is essentially a

file clerk working her way through college by assisting with clerical work around the office. A number of the statements for which her testimony is cited are in error.

14. The Trustee alleges that 412i ceased business on January 31, 2006 and that EBDG began operating the following day to support the idea that EBDG just sort of picked up where 412i left off. In fact EBDG did not open a bank account or deposit any money into an EBDG account of any kind until early May of 2006. Prior to May, EBDG was establishing relationships with insurance companies, signing its own contracts and appointing its own independent agents and attempting to solicit its own business. However, this did not result in any revenue until May.

15. I have worked in the pension business for a long time and I have a number of professional contacts and relationships in that business, as any professional in any field would. This includes relationships with insurance companies as well as relationships with independent insurance agents. When I started my new business, EBDG, I utilized these relationships. However, I must emphasize that very few, if any, of the end-user clients of EBDG are the same as those of 412i. This is so partly because insurance plans include surrender fees if the client chooses to switch to another insurance agency. It doesn't make sense for the client to pay those fees simply to give his/her commissions to a different company. Thus, I do not feel that it would be ethical for me to attempt to re-solicit those customers on behalf of EBDG when it is not to their advantage to change to a different agency. Thus, EBDG has generated new clients, rather than trying to solicit clients previously enrolled by 412i.

16. Contrary to the Trustee's assertions, EBDG has not received and is not receiving commissions from 412i renewals. My original position was that such commissions were the property of the bankruptcy estate. However, I lost that argument when Mr. Farrington revoked his assignment of commissions and claimed that the commissions belonged to him personally. He was upheld in so doing by this Court. Peter Pearce also revoked his assignment of commissions. Mr. Pearce apparently also owns his commissions.

17. The trustee claims that there was no difference betweer 412i and the structure of EBDG in terms of the office, the personnel, structure, and services. As indicated above, 412i offered one product where EBDG offers a selection of many products. The ownership of 412i was entirely different from EBDG, and included a number of shareholders and directors. I have sole ownership and control of EBDG. When EBDG first began, I was the only employee because EBDG could not afford to pay salaries. Where possible, EBDG was anxious to hire former 412i employees because they had experience in the pension business and would require less training than other potential employees in the Bellingham area. (This is true of Peter Pearce who is a licensed insurance agent and has the experience and licenses that I need to operate EBDG.) I also had personal experience with these people and knew what I could expect from them. I did not hire them simply to continue the operations of 412i and, in fact, was unable to hire many of them in the start-up phase of EBDG. Several clerical staff members had been shared between 412i and ARIS, and most of those employees continued to work for ARIS after 412i went out of business. In fact, EBDG has really only one full-

time employee, Peter Pearce. Sarah Pearce, and Priscilla Habig work for both EBDG and A.R.I.S, as do I. When I went about starting a new company, I utilized the relationships that I had in the business, including relationships with people at insurance companies, relationships with independent agents, and relationships with former employees. When I needed employees, where possible I hired people that I had relationships with and was comfortable with. The biggest mistake I ever made in hiring in my 25 years as an executive was in my appointment of Paul Hess as General Counsel of 412i. I had not known Mr. Hess previously. Mr. Hess had a Juris Doctor degree but had been convicted of a felony and disbarred and, therefore, was not qualified to serve in the position for which he was hired. After that experience, I much prefer to work with people that I know, and whom I have been able to trust. EBDG now takes the precaution of running background checks on all employees.

18. It is true that EBDG took over some of the office space that had been leased to 412i, though it later moved to a different floor of the same building. However up on the 4th floor was 10,000 square feet and 34 offices, many offices sub-let by Neighborhood mortgage, Vibrant USA and others using the common space. There was vacant space as well. I was aware that the space was available, that it was in the same building as ARIS and would facilitate a good working relationship with ARIS. I knew the management of the building and was comfortable that the arrangements would be suitable. EBDG did NOT assume the space in order to make people believe that EBDG was a mere continuation of 412i. In fact, during the entire time that 412i was in business, I do not recall ever meeting with a cli-

ent in the office. The same is true regarding EBDG. Both companies marketed nationwide, and consultations with clients have typically been done by telephone. The fact that EBDG operates out of the same office space vacated by 412i would not even register with most clients.

19. The Trustee pointed out that EBDG uses the same telephone number as 412i used. This telephone number was originally shared with ARIS and, later, Vex Video. My tax law practice also uses this number. When EBDG was formed and I decided to locate it in the same facility as ARIS, Vex Video, and my tax law practice, it made sense to share the cost of a phone line and reception services. Because of the way EBDG is set up, I do not believe that I received any calls that were intended for 412i or took any particular advantage of having the same telephone number.

20. Because of the broader range of products that EBDG offers, it does business with a number of insurance companies that 412i did not have contracts with. 412i had contracts with Pan American Life, Mass Mutual, American General, Pacific Life, American National and Lafayette Life. Executive Benefits never had contracts with American General, Mass Mutual, pan American Life, or Pacific Life. Executive Benefits went out and obtained its own contracts with American National Insurance Co. ("ANICO"), Lafayette Life Insurance Co. ("Lafayette"), and Principal Financial ("Principal"). Executive Benefits also has contracts with all of these companies, but also with Security Mutual, Penn Mutual, Mutual Trust, and One America. 412i never had contracts with Security Mutual, Penn Mutual. This difference is very significant in view of

the fact that there are only approximately eighteen insurance vendors in the United States. Thus, the fact that EBDG has a few common vendors with 412i is not surprising. The same would be true with any other similarly situated pension design company. But the fact that EBDG uses a number of insurance vendors that 412i did not use helps to demonstrate that EBDG is a fundamentally different business than 412i was, offering different products to different customers.

21. None of the allegations by Mr. Quakenbush suggest a transfer of funds from 412i to Executive Benefits Design Group. He mentions transfers to A.R.I.S by Peter Pearce and funds from Executive Benefits to A.R.I.S. Mr. Quakenbush never mentions transfers to Executive Benefits because there were no transfers to Executive Benefits. I do not know whether Peter Pearce deposited any of his commissions into the ARIS account. The trustee claims that this money was credited to EBDG in Quickbooks. If this is true, it is a clerical error. EBDG did not owe ARIS any money before May of 2010, and would not have benefitted by getting credit for Mr. Pearce's deposit. I do not know who made these alleged entries in ARIS's Quickbooks records or what that person was thinking when they did so. I simply know that EBDG did not receive any benefit for being credited with a deposit of funds owned by Peter Pearce to ARIS. Even if Mr. Pearce did submit funds that he owned into EBDG's accounts, this does not support the idea that EBDG was a mere continuation of 412i.

22. No furniture or any other assets were transferred to EBDG. Ms. Ewing has been waiting for instructions from the trustee and his attorney as to how

to dispose of the assets. They have refused to acknowledge that the assets even exist. They were listed on the bankruptcy filing,

23. 412i's practice was not to deposit commission checks with ARIS. It is, in fact, illegal to share commissions with an unlicensed entity. 412i would have to deposit the commission in its own accounts and then issue a payment to ARIS for its services in a way that was unrelated to the commission. EBDG follows the same policy. I would not knowingly permit a commission check over which I had control to be deposited with ARIS or any other plan administration company.

24. The Trustee correctly indicates that, while EBDG had a brand new website under a new domain name (and I would add that it includes a new and different company logo and page design), that some of the content is the same, including the biographies of key personnel. This does not indicate that the two companies are the same. Peter Pearce's biography and professional background is the same whether he is currently employed by 412i, EBDG, or ExxonMobil. While biographical content may be the same for both websites, the advertising, design scheme, logo, and advertised products are different. The very domain name where you find EBDG's page is different.

25. John Bremer and Charles Gramp were actuaries and worked only for ARIS. It would have been unethical for them to be employed as actuaries for ARIS and also working with EBDG to sell pension plans. While they did work with both EBDG and 412i in their work for ARIS, they were actually employed by 412i for only a brief period of time. After August of 2003, the actuaries worked for A.R.I.S. The differences

between the two companies would not have made a very big difference to them in their capacities with ARIS. Their sole concern as actuaries was the management of existing pension plans. What plans were being sold and how they were being sold was less important.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 7th day of April, 2010, in Bellingham, Washington.

/s/ Nicolas Paleveda
Nicolas Paleveda

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

A08-1132

PETER ARKISON, TRUSTEE, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., a Washington Corporation, et al., Defendants.

TRANSCRIPT OF THE DIGITALLY-RECORDED PROCEEDINGS

BEFORE THE HONORABLE THOMAS T. GLOVER

APRIL 14, 2010

* * * * *

THE COURT: Arkison against Executive Benefits.

MS. MOEWES: Denice Moewes representing the trustee.

Your Honor, this is the trustee's motion for summary judgment. The defendants filed their reply two and a half days late. They've asked for you to

grant them time to -- to just say, that's fine, they can file anything they want late.

My request, in response to that motion, is, if at the conclusion of this hearing, you believe there are disputed issues of fact, we would request that you continue this hearing to your May 4th calendar and allow the trustee an opportunity to reply to their response.

It is my belief that anything Mr. Palaveda has said in his declaration, I can find a contravening statement in any of the other approximately 40 declarations he's filed.

My second point, before I get to my argument, which will be brief, is the defendant's response is eight pages over length. You're only allowed 12 pages. They filed 19 or 20.

The trustee's motion for summary judgment is very simple. I submitted depositions from five employees of the debtor, Executive Benefits Insurance Agency -- I'm sorry -- Bellingham Insurance Agency. BIA was involved in a very contested arbitration proceeding in 2004. It was -- the judge -- or the award was going to be issued early February.

January 31st, Bellingham Insurance Agency ceases to exist when everybody leaves. And the next day Executive Benefits Insurance Agency opens up in the same space with the same business with the same employees, the same telephone number, the same fax machine. There was nothing that was different. There was nothing that was changed.

The depositions that I provided to you -- all five of the employees verify that. They, to this day, don't really know who they work for, whether they work for

ARIS, whether they work for BIA, EBA. They don't care. They're getting paid. But they're all undisputed as to what they testified to.

In the response, there's some claim, well, they're not member -- they're not management, they're not this, they're not that.

THE COURT: But your argument is really that at the time of these deposits, it's just after this organization comes into existence. The debtor ceases business.

MS. MOEWES: Yes.

THE COURT: And the new one comes in. And what you're saying is, they couldn't possibly have earned any commissions as of that date. Isn't that correct?

MS. MOEWES: That's correct. And that is the deposition testimony of --

THE COURT: But that's what you're arguing.

MS. MOEWES: That's what I'm arguing.

THE COURT: All right. And the reason I bring that up is that's what I want to hear the response to.

MR. TEICHERT: And Mr. Palaveda testified in his declaration --

THE COURT: Say your name.

MR. TEICHERT: Jeffrey Teichert --

THE COURT: All right.

MR. TEICHERT: -- representing Executive Benefits. I apologize.

THE COURT: Okay.

MR. TEICHERT: Mr. Palaveda testified in his declaration that, in fact, for the first four months that they were in existence, they didn't earn any commissions, that commissions -- the first commission check -- in fact, the bank account for the business wasn't opened until the first part of May. And the reason for that is Executive Benefits had all new clients. They didn't go out and recontract with --

THE COURT: When does the money go into the bank account?

MS. MOEWES: If you recall from the prior summary judgment several months ago, there was about 130,000 that went into -- that was transferred to ARIS. It wasn't four months after they started business. That transfer occurred in March.

THE COURT: That's what I'm concerned about.

MR. TEICHERT: Well, get the money from ARIS. The – that was done by Peter Pearce. And I know that they're alleging that that was done on behalf of Executive Benefits. The testimony by Nick Palaveda is that they didn't – that Executive Benefits didn't owe ARIS any money at that point. ARIS had not done any plan design because the first plans came in in May. Those transfers were all prior to that. They were done by Peter Pearce. And Executive Benefits doesn't have control of ARIS's bookkeeping. Those are all disputed facts that need to be discussed at trial. They can't be fleshed out in this proceeding.

THE COURT: I'll grant the motion for summary judgment. It seems to me fairly easy, particularly – you know, even if I thought there was an issue of

fact, I've got to tell you that I would trust Mr. Palaveda's testimony about as far as you can throw a chimney by smoke. But that's not the basis for the decision. I don't think the transfers have been adequately explained by the responding parties or really explained at all. So I'll grant the motion.

MS. MOEWES: Thank you, Your Honor.

The proceedings in this matter were concluded.)

CERTIFICATE

SHARI L. WHEELER certifies that:

The foregoing pages represent an accurate and complete transcript of the digitally-recorded proceedings before the HONORABLE THOMAS T. GLOVER, presiding in the matter of PETER H. ARKISON, TRUSTEE v. EXECUTIVE BENEFITS INSURANCE AGENCY, INC.; and

These pages constitute the original or a copy of the original transcript of the proceedings to the best of my ability.

Signed and dated this 4th day of August, 2013.

by /s/ Shari L. Wheeler

SHARI L. WHEELER, CCR NO. 2396

Hon. Thomas T. Glover

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No 06-11721

In re: BELLINGHAM INSURANCE AGENCY, INC., Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY A Washington Corporation, and A.R.I.S. And NICHOLAS PALAVEDA and MARJORIE EWING, and PETER PEARCE and JANE DOE PEARCE, Defendants.

ELECTION TO HAVE APPEAL HEARD IN DISTRICT COURT

Executive Benefits Insurance Agency, a defendant in this matter, elects under 28 U.S.C § 158(c)(1) and Federal Rule of Bankruptcy Procedure 8001(e)(1) to have its appeal, filed on even date herewith, heard in the United States District Court for the Western District of Washington.

DATED this 4th day of June 2010.

TEICHERT LAW OFFICE, PC

/s/ Jeffrey B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Defendant Executive
Benefits Insurance Agency

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case Number: C10-929MJP

BELLINGHAM INSURANCE AGENCY,
Debtor.

PETER ARKISON, TRUSTEE, Plaintiff/Appellee,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A.R.I.S., et al., Defendants/Appellants,

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT the appeal is DISMISSED and the Bankruptcy Court is AFFIRMED.

Dated January 24, 2011.

William M. McCool
Clerk of Court

s/Mary Duett
Deputy Clerk

Judge: Karen A. Overstreet
Chapter: 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. A08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY d/b/a Executive Benefits Design Group Et al. Defendants.

People's Bank Garnishee Defendant.

APPLICATION FOR WRIT OF GARNISHMENT

Denice E. Moewes, being first duly sworn on oath, deposes and says:

1. I am an attorney for Peter Arkison, the chapter 7 trustee in this case.

2. On May 26, 2010, Judge Karen A. Overstreet entered judgment for the trustee in the United States Bankruptcy Court in the above-entitled matter which is wholly unsatisfied.

3. The following amounts are due under this judgment as of May 26, 2010:

Judgment principal:	$373,291.28
Interest (from date of complaint to May 26, 2010 at 2.14%)	$15,933.08
Filing fee	$250.00
Garnishment attorney fee	$250.00
Total Judgment Amount	$389,724.36

4. The plaintiff has reason to believe and does believe that the garnishee is indebted to the defendant in amounts exceeding those exempted from garnishment by any state of federal law; and

5. The garnishee is not the employer of the judgment debtor.

APPLIED FOR this 30th day of September, 2011.

/s/ Denice E. Moewes
Denice E. Moewes, WSBA #14964 Attorney for Peter Arkison, Plaintiff
Chapter 7 trustee for bankruptcy estate of Bellingham Insurance Agency

Judge: Karen A. Overstreet
Chapter: 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. A08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY d/b/a Executive Benefits Design Group Et al. Defendants.

People's Bank Garnishee Defendant.

WRIT OF GARNISHMENT

THE UNITED STATES OF AMERICA TO:

People's Bank
Garnishee Defendant

AND TO: Executive Benefits Insurance Agency.

The above-named plaintiff has applied for a writ of garnishment against you, claiming that the above-named defendants are indebted to plaintiff and that the amount to be held to satisfy that indebtedness is $389,724.36, consisting of:

Judgment principal:	$373,291.28

Interest (from date of complaint to May 26, 2010 at 2.14%)	$15,933.08
Filing fee	$250.00
Garnishment attorney fee	$250.00
Total Judgment Amount	$389,724.36

YOU ARE HEREBY COMMANDED, unless otherwise directed by the Court or by this writ, not to pay any debt, whether earnings subject to this garnishment or any other debt, owed to these defendants at the time this writ was served and not to deliver, sell, or transfer, or recognize any sale or transfer of, any personal property or effects of the defendants in your possession or control at the time when this writ was served. Any such payment, delivery, sale, or transfer is void to the extent necessary to satisfy the plaintiff's claim and costs for this writ with interest.

YOU ARE FURTHER COMMANDED to answer this writ by filling in the attached form according to the instructions in this writ and in the answer forms and, within twenty days after the service of the writ upon you, to mail or deliver the original of such answer to the Court, one copy to the plaintiff or the plaintiff's attorney and one copy to the defendants, in the envelopes provided.

If you owe the defendants a debt payable in money in excess of the amount set forth in the first paragraph of this writ, hold only the amount set forth in the first paragraph and any processing fee if one is charged and release all additional funds or property to defendants.

YOUR FAILURE TO ANSWER THIS WRIT AS COMMANDED WILL RESULT IN A JUDGMENT BEING ENTERED AGAINST YOU FOR THE FULL AMOUNT OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS WITH ACCRUING WRIT OF GARNISHMENT INTERESTS AND COSTS WHETHER OR NOT YOU OWE ANYTHING TO THE DEFENDANTS.

Witness, the Honorable Karen A. Overstreet, United States Bankruptcy Judge, and the seal thereof, this 30th day of September, 2011.

Mark L. Hatcher
Clerk of the United States Bankruptcy Court For the Western District of Washington

By:

/s/_____
700 Stewart #6301 Seattle WA 98101

Dated this 30th day of September, 2011

Presented by:
WOOD & JONES PS

_____Denice E. Moewes, WSBA #14964 Attorney for Peter Arkison, Plaintiff Chapter 7 trustee for bankruptcy estate of Bellingham Insurance Agency

BIA – WRIT – PEOPLE'S BANK

Judge: Karen A. Overstreet
Chapter: 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY d/b/a Executive Benefits Design Group Et al. Defendants.

KeyBank Garnishee Defendant.

APPLICATION FOR WRIT OF GARNISHMENT

Denice E. Moewes, being first duly sworn on oath, deposes and says:

1. I am an attorney for Peter Arkison, the chapter 7 trustee in this case.

2. On May 26, 2010, Judge Karen A. Overstreet entered judgment for the trustee in the United States Bankruptcy Court in the above-entitled matter which is wholly unsatisfied.

3. The following amounts are due under this judgment as of May 26, 2010:

Judgment principal:	$373,291.28
Interest (from date of complaint to May 26, 2010 at 2.14%)	$15,933.08
Filing fee	$250.00
Garnishment attorney fee	$250.00
Total Judgment Amount	$389,724.36

4. The plaintiff has reason to believe and does believe that the garnishee is indebted to the defendant in amounts exceeding those exempted from garnishment by any state of federal law; and

5. The garnishee is not the employer of the judgment debtor.

APPLIED FOR this 30th day of September, 2011.

/s/ Denice E. Moewes
Denice E. Moewes, WSBA #14964
Attorney for Peter Arkison, Plaintiff
Chapter 7 trustee for bankruptcy estate of Bellingham Insurance Agency

BIA – APPLICATION – PEOPLES BANK

Judge: Karen A. Overstreet
Chapter: 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY d/b/a Executive Benefits Design Group Et al. Defendants.

KeyBank Garnishee Defendant.

WRIT OF GARNISHMENT

THE UNITED STATES OF AMERICA TO:
Key Bank
Garnishee Defendant

AND TO: Executive Benefits Insurance Agency.

The above-named plaintiff has applied for a writ of garnishment against you, claiming that the above-named defendants are indebted to plaintiff and that the amount to be held to satisfy that indebtedness is $389,724.36, consisting of:

Judgment principal:	$373,291.28
Interest (from date of complaint to May 26, 2010 at 2.14%)	$15,933.08
Filing fee	$250.00
Garnishment attorney fee	$250.00
Total Judgment Amount	$389,724.36

YOU ARE HEREBY COMMANDED, unless otherwise directed by the Court or by this writ, not to pay any debt, whether earnings subject to this garnishment or any other debt, owed to these defendants at the time this writ was served and not to deliver, sell, or transfer, or recognize any sale or transfer of, any personal property or effects of the defendants in your possession or control at the time when this writ was served. Any such payment, delivery, sale, or transfer is void to the extent necessary to satisfy the plaintiff's claim and costs for this writ with interest.

YOU ARE FURTHER COMMANDED to answer this writ by filling in the attached form according to the instructions in this writ and in the answer forms and, within twenty days after the service of the writ upon you, to mail or deliver the original of such answer to the Court, one copy to the plaintiff or the plaintiff's attorney and one copy to the defendants, in the envelopes provided.

If you owe the defendants a debt payable in money in excess of the amount set forth in the first paragraph of this writ, hold only the amount set forth in the first paragraph and any processing fee if one is charged and release all additional funds or property to defendants.

YOUR FAILURE TO ANSWER THIS WRIT AS COMMANDED WILL RESULT IN A JUDGMENT BEING ENTERED AGAINST YOU FOR THE FULL AMOUNT OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS WITH ACCRUING WRIT OF GARNISHMENT INTERESTS AND COSTS WHETHER OR NOT YOU OWE ANYTHING TO THE DEFENDANTS.

Witness, the Honorable Karen A. Overstreet, United States Bankruptcy Judge, and the seal thereof, this 30th day of September, 2011.

Mark L. Hatcher
Clerk of the United States Bankruptcy Court For the Western District of Washington

By:
/s/
700 Stewart #6301 Seattle WA 98101

Dated this 30th day of September, 2011

Presented by:
WOOD & JONES PS

/s/ Denice E. Moewes Denice E. Moewes, WSBA #14964
Attorney for Peter Arkison, Plaintiff
Chapter 7 trustee for bankruptcy estate of Bellingham Insurance Agency

BIA – WRIT – KEY BANK

Judge: Karen A. Overstreet
Chapter: 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY,
Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY d/b/a Executive Benefits Design Group Et al. Defendants.

Bank of America 800 Fifth Avenue WA-1-501-10-17 Seattle WA 98104 Garnishee Defendant.

APPLICATION FOR WRIT OF GARNISHMENT

Denice E. Moewes, being first duly sworn on oath, deposes and says:

1. I am an attorney for Peter Arkison, the chapter 7 trustee in this case.

2. On May 26, 2010, Judge Karen A. Overstreet entered judgment for the trustee in the United States Bankruptcy Court in the above-entitled matter which is wholly unsatisfied.

3. The following amounts are due under this judgment as of May 26, 2010:

Judgment principal:	$373,291.28
Interest (from date of complaint to May 26, 2010 at 2.14%)	$15,933.08
Filing fee	$250.00
Garnishment attorney fee	$250.00
Total Judgment Amount	$389,724.36

4. The plaintiff has reason to believe and does believe that the garnishee is indebted to the defendant in amounts exceeding those exempted from garnishment by any state of federal law; and

5. The garnishee is not the employer of the judgment debtor.

APPLIED FOR this 30th day of September, 2011.

/s/ Denice E. Moewes
Denice E. Moewes, WSBA #14964
Attorney for Peter Arkison, Plaintiff
Chapter 7 trustee for bankruptcy estate of Bellingham Insurance Agency

BIA - APPLICATION - PEOPLES BANK

Judge: Karen A. Overstreet
Chapter: 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. 06-11721

IN RE: BELLINGHAM INSURANCE AGENCY, Debtor.

Adversary No. 08-1132

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY d/b/a Executive Benefits Design Group Et al. Defendants.

Bank of America 800 Fifth Avenue WA-1-501-10-17 Seattle WA 98104 Garnishee Defendant.

WRIT OF GARNISHMENT

THE UNITED STATES OF AMERICA TO:

Bank of America
Garnishee Defendant

AND TO: Executive Benefits Insurance Agency.

The above-named plaintiff has applied for a writ of garnishment against you, claiming that the above-named defendants are indebted to plaintiff and that the amount to be held to satisfy that indebtedness is $389,724.36, consisting of:

Judgment principal:	$373,291.28
Interest (from date of complaint to May 26, 2010 at 2.14%)	$15,933.08
Filing fee	$250.00
Garnishment attorney fee	$250.00
Total Judgment Amount	$389,724.36

YOU ARE HEREBY COMMANDED, unless otherwise directed by the Court or by this writ, not to pay any debt, whether earnings subject to this garnishment or any other debt, owed to these defendants at the time this writ was served and not to deliver, sell, or transfer, or recognize any sale or transfer of, any personal property or effects of the defendants in your possession or control at the time when this writ was served. Any such payment, delivery, sale, or transfer is void to the extent necessary to satisfy the plaintiff's claim and costs for this writ with interest.

YOU ARE FURTHER COMMANDED to answer this writ by filling in the attached form according to the instructions in this writ and in the answer forms and, within twenty days after the service of the writ upon you, to mail or deliver the original of such answer to the Court, one copy to the plaintiff or the plaintiff's attorney and one copy to the defendants, in the envelopes provided.

If you owe the defendants a debt payable in money in excess of the amount set forth in the first paragraph of this writ, hold only the amount set forth in the first paragraph and any processing fee if one is

charged and release all additional funds or property to defendants.

YOUR FAILURE TO ANSWER THIS WRIT AS COMMANDED WILL RESULT IN A JUDGMENT BEING ENTERED AGAINST YOU FOR THE FULL AMOUNT OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS WITH ACCRUING WRIT OF GARNISHMENT INTERESTS AND COSTS WHETHER OR NOT YOU OWE ANYTHING TO THE DEFENDANTS.

Witness, the Honorable Karen A. Overstreet, United States Bankruptcy Judge, and the seal thereof, this ___ day of September, 2011.

Mark L. Hatcher
Clerk of the United States Bankruptcy Court For the Western District of Washington

By:
/s/_____700
Stewart #6301 Seattle WA 98101

Dated this 30th day of September, 2011

Presented by:
WOOD & JONES PS

/s/ Denice E. Moewes
Denice E. Moewes, WSBA #14964
Attorney for Peter Arkison, Plaintiff

Chapter 7 trustee for bankruptcy estate of

Bellingham Insurance Agency

BIA – WRIT – Bank of America

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Article III of the United States Constitution precludes Congress from assigning certain "core" bankruptcy proceedings involving private rights to non-Article III bankruptcy judges for final adjudication. *Stern* left unresolved several related questions regarding the constitutional and statutory authority of bankruptcy judges, including:

1. Whether Article III permits the exercise of the judicial power of the United States over private rights by non-Article III bankruptcy judges on the sole basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list includes the names of all parties to the proceedings below:

Petitioner Executive Benefits Insurance Agency (EBIA) was the appellant in the court of appeals. EBIA has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Peter Arkison is the Chapter 7 Trustee of the bankruptcy estate of Bellingham Insurance Agency, Inc. (Bellingham), and was the appellee in the court of appeals.

Aegis Retirement Income Services, Inc., Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce were EBIA's co-defendants in the adversary proceeding commenced in the bankruptcy court by Arkison as Trustee of Bellingham's estate, but were not subject to the bankruptcy court's judgment that was reviewed by the court of appeals, and were not parties to the proceedings before the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional provision involved 2
Statutory provisions involved 2
Statement 2
I. Statutory framework 2
II. Proceedings in this case 6
A. The bankruptcy court's entry of final judgment against EBIA 6
B. Appellate proceedings in the district court and court of appeals 9
Summary of argument 12
Argument:
I. The Article III violation identified in *Stern* v. *Marshall* cannot be cured by litigant consent in an individual case 16
A. The constitutional allocation of functions among the three branches of government cannot be altered by agreement between the branches or wishes of private parties 16
B. Conferring on non-Article III bankruptcy courts authority to render judgments of the United States violates the separation of powers 20

Table of Contents—Continued: Page

C. Private litigants cannot, by consent or waiver, confer on non-Article III bankruptcy courts authority to enter judgment in violation of the separation of powers 24

1. Consent cannot cure structural Article III violations affecting the separation of powers, such as that identified in *Stern* 25

2. Even assuming consent can be relevant to the constitutional inquiry when Congress confers authority to enter final judgments on non-Article III courts, it is only to the extent that consent is a limiting feature of the statutory scheme 28

a. Whereas a statutory consent requirement might diminish a potential threat to the separation of powers, ad-hoc litigant consent cannot validate adjudication under an unconstitutional statute 28

b. Insisting that consent be expressly included in the statute ensures that it will serve as a limiting feature on the bankruptcy court's authority to enter judgment 33

Table of Contents—Continued: Page

3. Where the bankruptcy court's judgment was entered without constitutional authority in violation of the separation of powers, it must be vacated on appeal 36

II. Even if consent could cure the constitutional violation identified in *Stern*, such consent must be knowing and voluntary, unlike the purported consent here 38

A. Only consent that is knowing and voluntary is capable of conferring judicial authority on a non-Article III judge 39

B. Failure to assert an argument foreclosed by binding precedent, as here, does not constitute knowing and voluntary consent 41

C. The court of appeals finding of implied consent demonstrates that a standard of knowing and voluntary consent is essential to safeguard this Court's constitutional holding in *Stern* 43

III. Bankruptcy judges lack statutory authority to issue proposed findings of fact and conclusions of law in core proceedings 46

A. Section 157(b) does not authorize bankruptcy judges to propose findings of fact and conclusions of law in core proceedings 48

Table of Contents—Continued: Page

1. The text and structure of Section 157(b) do not permit bankruptcy courts to propose findings of fact and conclusions of law in core proceedings 48

2. Congress's use of "hear and determine" elsewhere confirms the plain meaning of Section 157(b) 51

B. Nor does Section 157(c) authorize bankruptcy judges to propose findings of fact and conclusions of law in core proceedings 52

C. Nor may district courts utilize Section 157(a) to confer on bankruptcy courts authority to propose findings of fact and conclusions of law in core proceedings 53

D. The responsibility for addressing the constitutional defects in bankruptcy administration lies with Congress, not the Judiciary 55

Conclusion 58

Appendix A — 28 U.S.C. 157 ..... 1a

Appendix B — 28 U.S.C. 158 ..... 5a

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson v. *Woodcreek Venture Ltd.*, 351 F.3d 911 (9th Cir. 2003) 35

ASARCO, Inc. v. *Elliott Mgmt. (In re ASARCO, LLC)*, 650 F.3d 593 (5th Cir. 2011) 38

Balas (In re), 449 B.R. 567 (Bankr. C.D. Cal. 2011) 23

Big Horn County Elec. Co-op., Inc. v. *Adams*, 219 F.3d 944 (9th Cir. 2000) 42

Brown v. *Bd. of Educ.*, 349 U.S. 294 (1955) 21

Cent. Va. Cmty. Coll. v. *Katz*, 546 U.S. 356 (2006) 23

Chi. & S. Air Lines v. *Waterman S. S. Corp.*, 333 U.S. 103 (1948) 21

Clinton v. *New York*, 524 U.S. 417 (1998) 18

Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) ..... *passim*

Curtis Publ'g Co. v. *Butts*, 388 U.S. 130 (1967) 42

Duck v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), cert. denied 485 U.S. 1006 (1988), overruled by *Executive Benefits Ins. Agency* v. *Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012) 6, 41, 45

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 49

Cases—Continued:

Field v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421 (D. Haw. 2011) 52
Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 17, 18
Freytag v. *Comm'r Internal Revenue*, 501 U.S. 868 (1991) 25
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 23, 25, 40
Gomez v. *United States*, 490 U.S. 858 (1989) 35
Gonzalez v. *United States*, 553 U.S. 242 (2008) 30
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 6, 30, 41
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 34
Gustafson v. *Alloyd Co., Inc.*, 513 U.S. 561 (1995) 51
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N. A.*, 530 U.S. 1 (2000) 48
Hawknet, Ltd. v. *Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009) 42
Heckers v. *Fowler*, 69 U.S. (2 Wall.) 123 (1864) 31
INS v. *Chadha*, 462 U.S. 919 (1983) 17, 18, 47
Kimberly v. *Arms*, 129 U.S. 512 (1889) 31
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 35
Kucana v. *Holder*, 558 U.S. 233 (2010) 34
Loving v. *United States*, 517 U.S. 748 (1996) 17

Cases—Continued:

MacDonald v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932) 31

Mansfield, C. & L.M. Ry. Co. v. *Swan*, 111 U.S. 379 (1884) 20

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) ..... *passim*

Marshall v. *Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010), aff'd on other grounds, 131 S. Ct. 2594 (2011) 44, 45

McDermott Int'l, Inc. v. *Wilander*, 498 U.S. 337 (1991) 51

Mort Ranta v. *Gorman*, 721 F.3d 241 (4th Cir. 2013) 37

Muskrat v. *United States*, 219 U.S. 346 (1911) 20

N.L.R.B. v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573 (1961) 51

New York v. *United States*, 505 U.S. 144 (1992) 18

Nguyen v. *United States*, 539 U.S. 69 (2003) 40

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ..... *passim*

O'Donoghue v. *United States*, 289 U.S. 516 (1933) 21

Ortiz v. *Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011) 37, 53

Cases—Continued:

Pacemaker Diagnostic Clinic of Am. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824 (1984) ..... *passim*

PDG Los Arcos, LLC v. *Adams*, 436 F. App'x 739 (9th Cir. 2011) 45

Peretz v. *United States*, 501 U.S. 923 (1991) 30, 32

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 18, 21, 22

Roell v. *Withrow*, 538 U.S. 580 (2003) ..... *passim*

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 55

Sigma Micro v. *Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775 (9th Cir. 2007) ..... *passim*

Sosna v. *Iowa*, 419 U.S. 393 (1975) 20

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) ..... *passim*

Stevo v. *Frasor*, 662 F.3d 880 (7th Cir. 2011) 35

Thomas v. *Arn*, 474 U.S. 140 (1985) 31

Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) 30

United States v. *Cotton*, 535 U.S. 625 (2002) 36

Waldman v. *Stone*, 698 F.3d 910 (6th Cir. 2012), cert. denied, 133 S. Ct. 1604 (2013) 27

Wellness Int'l Network, Ltd. v. *Sharif*, —F.3d—, No. 12-1349, 2013 WL 4441926 (7th Cir. Aug. 21, 2013) 26, 27, 29, 31

Yeldon v. *Fisher*, 710 F.3d 452 (2d Cir. 2013) 35

Constitution, statutes and regulations:

U.S. Const. art. II, § 2, cl. 2 3
U.S. Const. art III, § 1 ..... *passim*
11 U.S.C. 106 23
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) 56
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. 157(a)) 2
Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. 151 *et seq.*:
28 U.S.C. 152(a) 23
28 U.S.C. 152(a)(1) 3, 23
28 U.S.C. 152(e) 3, 23
28 U.S.C. 153(a) 3
28 U.S.C. 157(a) 54
28 U.S.C. 157(b) 4, 32, 41, 55
28 U.S.C. 157(b)(1) ..... *passim*
28 U.S.C. 157(b)(2)(A) 4
28 U.S.C. 157(b)(2)(C) 4
28 U.S.C. 157(b)(2)(H) 4
28 U.S.C. 157(b)(3) 4
28 U.S.C. 157(c) 4, 54
28 U.S.C. 157(c)(1) ..... *passim*
28 U.S.C. 157(c)(2) 4, 6, 34, 50
28 U.S.C. 158(a) ..... *passim*

Constitution, statutes and regulations—Continued:

28 U.S.C. 158(b) 5
28 U.S.C. 158(b)(1) 51, 52
28 U.S.C. 158(c)(1) 5
28 U.S.C. 158(d) 52
28 U.S.C. 158(d)(1) 5
28 U.S.C. 158(d)(2) 5, 23
28 U.S.C. 636(c)(1) 32, 34
28 U.S.C. 636(c)(2) 33
28 U.S.C. 636(c)(3) 32
28 U.S.C. 1963 ..... 4, 22

Miscellanous:

1 Collier on Bankruptcy ¶ 3.02[1] (16th ed. 2009) 54
130 Cong. Rec. 6045 (1984) 56
American Heritage Dictionary (5th ed. 2011) 48
Bankruptcy Proceedings (In re), Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012) 54
Black's Law Dictionary (5th ed. 1979) 48
Black's Law Dictionary (9th ed. 2009) 48
The Federalist No. 78 (Alexander Hamilton) (C. Rossiter ed. 1961) 21, 22
The Federalist No. 79 (Alexander Hamilton) (C. Rossiter ed. 1961) 22
Fed. R. Bankr. P.:
Rule 7069 ..... 5, 23
Rule 7008 6

Miscellanous—Continued:

Rule 7012 6
Fed. R. Civ. P.:
Rule 69 5
Rule 83 54
Hon. Joan N. Feeney, Statement to the House of Representatives Judiciary Committee on the Impact of *Stern v. Marshall*, 86 Am. Bankr. L.J. 357 (2012) 57
H.R. Rep. 109-31, pt. 1 (2005) 56
Standing Order of Reference Re: Title 11 (In re), (D. Del. Feb. 29, 2012) 54
Standing Order of Reference Re: Title 11 (In re), No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012) 54

In the Supreme Court of the United States

No. 12-1200

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–40a) is reported at 702 F.3d 553. The opinion of the district court (Pet. App. 41a–52a) is unreported. The opinion of the bankruptcy court (Pet. App. 53a–54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2012. On March 1, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 3, 2013, and the petition was filed on that date. The petition for

a writ of certiorari was granted on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATUTORY PROVISIONS INVOLVED

Sections 157 and 158 of Title 28 of the United States Code are reproduced in a statutory appendix hereto, App. 1a–9a, *infra*.

STATEMENT

I. STATUTORY FRAMEWORK

In 1984, Congress conferred on bankruptcy judges adjudicatory authority over "any or all cases under title 11," meaning petitions for relief, as well as "any or all proceedings [(1)] arising under title 11 or [(2)] arising in or [(3)] related to a case under title 11," provided that a district court makes an appropriate reference. Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. 157(a)). The Constitution requires that the judicial power of the United States be exercised by judges appointed by the President with

the advice and consent of the Senate, that those judges "hold their Offices during good Behaviour," and that their salaries be protected against diminution. U.S. Const. art. II, § 2, cl. 2; art. III, § 1. Bankruptcy judges have none of those characteristics. They are appointed by the courts of appeals for 14-year terms, 28 U.S.C. 152(a)(1); they are subject to removal by the judicial council of the circuit in which they sit for incompetence, misconduct, neglect of duty, or physical or mental disability, 28 U.S.C. 152(e); and their salaries are subject to diminution by Congress, see 28 U.S.C. 153(a).

The 1984 Act was promulgated in the wake of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which this Court concluded that the Bankruptcy Act of 1978 violated Article III by vesting bankruptcy courts with authority to enter final judgment on a state-law contract claim asserted against a non-creditor, *id.* at 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). Justice Brennan's opinion for a plurality of the Court reviewed "three narrow situations" in which, on the basis of long-standing historical practice, adjudicatory authority could be vested in legislative courts not protected by Article III: territorial courts, military courts-martial, and legislative courts empowered to adjudicate cases involving "public rights." *Id.* at 64–67. The plurality concluded that the power conferred on the newly-formed bankruptcy courts was not authorized by any of these historical doctrines, including the public rights doctrine. *Id.* at 63–76. In so holding, the plurality drew a distinction between claims "at the core of the federal bankruptcy power," which "may well be a 'public right,'" and "state-created private rights" susceptible

to federal adjudication only by Article III judges. *Id.* at 71.

With the language of *Northern Pipeline* plainly in mind, Congress responded with the 1984 Act, dividing bankruptcy proceedings into two categories—core and non-core—and imbuing bankruptcy courts with different authority in each. See 28 U.S.C. 157(b), (c). Congress defined "core proceedings" as those that "aris[e] under title 11, or aris[e] in a case under title 11." 28 U.S.C. 157(b)(1). In a non-exhaustive list, Congress identified examples of core proceedings, including "matters concerning the administration of the estate," "counterclaims by the estate against persons filing claims against the estate," and "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. 157(b)(2)(A), (C), (H). Non-core proceedings are those that are not "core proceedings," *i.e.*, do not "aris[e] under title 11 or aris[e] in a case under title 11," but are nonetheless "related to a case under title 11." 28 U.S.C. 157(b)(1), (c)(2); see 28 U.S.C. 157(b)(3) (directing bankruptcy judge to classify proceedings into one or the other category).

Bankruptcy courts are empowered by statute to "hear and determine" and to enter "appropriate orders and judgments" in "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. 157(b)(1). Bankruptcy court judgments can be registered in another judicial district, 28 U.S.C. 1963, and they are entitled to preclusive effect in subsequent proceedings, including in state court proceedings, see, *e.g.*, *Stern* v. *Marshall*, 131 S. Ct. 2594, 2602 (2011). Bankruptcy judges, like district court judges, are empowered to enforce their own

judgments by issuing writs of execution. Fed. R. Bankr. P. 7069; Fed. R. Civ. P. 69.

Bankruptcy court judgments entered in core proceedings are subject to review only if a party chooses to appeal. Appeals from bankruptcy judgments are heard by an Article III district court or—in those circuits in which such a panel has been established and where neither party has specifically requested review by a district court—by a bankruptcy appellate panel composed of non-Article III bankruptcy judges. 28 U.S.C. 158(a)–(b), (c)(1). Both the district courts and bankruptcy appellate panels review bankruptcy judgments under traditional appellate standards. *Stern*, 131 S. Ct. at 2604 (citing 28 U.S.C. 158(a); Fed. R. Bankr. P. 8013). Appellate decisions of both the district courts and the bankruptcy appellate panels are subject to further review by the courts of appeals. 28 U.S.C. 158(d)(1). Bankruptcy court judgments may also, in some circumstances, be appealed directly to the court of appeals. 28 U.S.C. 158(d)(2).

Non-core proceedings are governed by Section 157(c) of Title 28. Bankruptcy judges are empowered by statute to hear non-core proceedings and submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. 157(c)(1). The district court, in turn, is empowered to enter judgment in a non-core proceeding after reviewing de novo any portion of the bankruptcy judge's proposed findings and conclusions to which a party has objected. *Ibid.*

Section 157(c) also provides that, with the consent of all parties, a bankruptcy judge may "hear and determine" a non-core proceeding and enter "appropriate orders and judgments" subject to appellate review un-

der Section 158, like bankruptcy judgments entered in core proceedings. 28 U.S.C. 157(c)(2). The Federal Rules of Bankruptcy Procedure require that parties in a non-core proceeding indicate explicitly in their pleading their consent or refusal to adjudication by the bankruptcy court. Fed. R. Bankr. P. 7008, 7012.

II. PROCEEDINGS IN THIS CASE

A. The Bankruptcy Court's Entry Of Final Judgment Against EBIA

In 2006, Bellingham Insurance Agency, Inc. (Bellingham) declared bankruptcy, filing a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Washington. Respondent Peter H. Arkison (Trustee) was appointed trustee of Bellingham's bankruptcy estate, and later commenced an adversary proceeding against non-creditor EBIA and five other defendants. Among other claims, the Trustee asserted that EBIA had received fraudulent transfers from Bellingham and that EBIA was liable for Bellingham's debts as a successor corporation. See J.A. 65, 70, 73. The Trustee's complaint alleged that the claims against EBIA were "core." J.A. 50.

At the time the Complaint was filed, Ninth Circuit precedent conclusively established that bankruptcy-court final adjudication of fraudulent conveyance actions was consistent with Article III. *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), cert. denied, 485 U.S. 1006 (1988), overruled by Pet. App 15a. Under *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), however, a defendant in such an action could insist on its right to a jury trial. But even where a defendant asserted its jury right under *Granfinanciera*, Ninth Circuit precedent established that "the bankruptcy

court may retain jurisdiction over the action for pretrial matters," including disposition of the case on summary judgment. *Sigma Micro* v. *Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 788 (2007).

In its Answer, EBIA demanded a jury trial, and indicated that it did not consent to a jury trial before a bankruptcy judge. J.A. 94. After the bankruptcy judge calendared the case for trial, EBIA renewed its demand for a jury trial before the district court by filing a motion to vacate the trial date. Pet. App. 77a–80a. In its motion, EBIA acknowledged that under Ninth Circuit precedent it had no right to an Article III court for proceedings prior to trial. See *id.* at 72a (citing *Healthcentral.com*, 504 F.3d at 786–788). The bankruptcy judge referred EBIA's request to the district court, which construed it as a motion to withdraw the reference and requested a status report to determine the matter's readiness for trial. J.A. 104.

Several parties submitted a status report indicating that the Trustee was about to file a motion for summary judgment against EBIA in the bankruptcy court and requesting time to conduct a settlement conference before a bankruptcy judge. Pet. App. 74a–75a. EBIA did not join in that status report. *Id.* at 76a. Noting that the case was still far from ready for trial, the district court stayed consideration of the motion to withdraw for three months and, consistent with Ninth Circuit precedent, allowed pretrial proceedings to continue in the bankruptcy court. *Id.* at 62a–63a.

Shortly after the status report was filed, the Trustee moved in the bankruptcy court for summary judgment against EBIA on the fraudulent transfer and suc-

cessor liability causes of action. J.A. 106–107. The Trustee argued that EBIA received fraudulent transfers from Bellingham's estate, as evidenced by deposits made by EBIA and Peter Pearce (a former Bellingham employee) into the bank account of a third corporation, A.R.I.S., Inc. (ARIS). J.A. 119. The motion contended that these deposits represented commissions earned by Bellingham and were thus assets of the estate. See J.A. 120. The Trustee further asserted that ARIS's bookkeeping software showed the deposits were subsequently credited back to EBIA as "intercompany transfers." J.A. 119.

EBIA disagreed. To meet its burden in opposing summary judgment, EBIA submitted a declaration from its President and CEO, Nicholas Paleveda, stating that any commissions Pearce deposited with ARIS were never transferred to EBIA, and that, notwithstanding what ARIS's internal bookkeeping software reflected, EBIA did not owe any debt to ARIS that could have been offset by the purported intercompany transfers alleged by the Trustee. See J.A. 178. Paleveda further stated that by May 2006—when the earliest purported transfers of commissions from EBIA to an ARIS account occurred, see J.A. 142—any money EBIA earned was its own revenue from new business cultivated in the four months since EBIA was formed. J.A. 174.

A hearing on the Trustee's motion was held on April 14, 2010. At that hearing the bankruptcy judge commented that he did not find Mr. Paleveda's declaration credible. J.A. 184–185. While disclaiming reliance on this credibility determination, the bankruptcy judge granted summary judgment for the Trustee, notwithstanding the Paleveda declaration, on the ground that

the judge did not "think the transfers ha[d] been adequately explained by the responding parties." J.A. 185.

The bankruptcy court thereafter entered a final judgment against EBIA in the amount of $389,474.36. Pet. App. 53a–55a, 57a. Upon learning that summary judgment had been granted against EBIA, the district court denied EBIA's motion to withdraw the reference as moot. See Pet. App. 61a.

B. Appellate Proceedings In The District Court And Court Of Appeals

EBIA appealed the bankruptcy court's final judgment to the district court. The district court indicated that the bankruptcy court's grant of summary judgment was subject to de novo review, but, at the same time, invoked a "substantial evidence" standard in reviewing the bankruptcy court's findings. Pet. App. 45a, 50a. The district court concluded that EBIA had failed to show any error on the part of the bankruptcy court and, on that basis, dismissed EBIA's appeal and affirmed the bankruptcy court's judgment. Pet. App. 51a; J.A. 188. Following the district court's decision on appeal, the Trustee executed the bankruptcy court's judgment by obtaining writs of garnishment from the bankruptcy court. J.A. 189–205.

EBIA appealed the district court's appellate ruling to the Ninth Circuit. After EBIA had filed its opening brief, this Court decided *Stern*, holding that bankruptcy courts lack constitutional authority to enter final judgment in certain core proceedings. EBIA thereafter filed a supplemental brief arguing that, under *Stern*, the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims. Pet. App. 7a–8a.

The court of appeals affirmed. Pet. App. 39a–40a. Regarding EBIA's objection to the bankruptcy court entering final judgment, the court of appeals observed that "until quite recently, the exercise of that statutory authority [to enter final judgment in fraudulent conveyance proceedings] was routine and uncontroversial." Pet. App. 9a. The court of appeals acknowledged, however, that "following the Supreme Court's decision in *Stern v. Marshall*, the view that such judgments are consistent with the Constitution is no longer tenable." *Ibid.* Relying on *Stern* and this Court's earlier decision *Granfinanciera*, the court of appeals overruled its decision in *Mankin*, and held that a fraudulent conveyance claim against a non-creditor cannot constitutionally be assigned by Congress to a bankruptcy court for final adjudication. *Id.* at 15a, 23a.

The court of appeals recognized that its holding, though required by *Stern*, "create[d] a gap in [the Bankruptcy Code's] statutory framework" because "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." Pet. App. 23a–24a. The court observed that 28 U.S.C. 157(c)(1) grants bankruptcy judges such authority only in a proceeding that is " 'not a core proceeding,' " and further that a fraudulent conveyance proceeding does not fall within Section 157(c)(1) because it is a "core proceeding" under Section 157(b). *Id.* at 24a. Nevertheless, the court of appeals interpreted "the power to 'hear and determine' a proceeding" under Section 157(b)(1) to encompass the "more modest power to submit findings of fact and recommendations of law to the district courts." *Id.* at 24a. It reasoned such a construction was appropriate because Congress intended to vest bankruptcy judges

with "as much adjudicatory power as the Constitution will bear." *Ibid.* The court of appeals did not attempt to reconcile its holding with Section 157(b)'s statement that a bankruptcy court's "orders and judgments" in core proceedings are reviewable only on "appeal[]" to the district court. 28 U.S.C. 157(b)(1), 158(a).

The court of appeals further held that EBIA had "impliedly consented" to adjudication by the bankruptcy judge. Pet. App. 30a. It reasoned that a litigant's consent can cure an otherwise unconstitutional exercise of judicial power by a non-Article III bankruptcy judge. Pet. App. 26a–29a. The court acknowledged that litigant consent cannot overcome Article III's structural protection of the separation of powers. *Id.* at 27a n.9 (citing *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850–851 (1986)). But it believed the structural component of Article III is only implicated where "the encroachment or aggrandizement of one branch at the expense of the other is at stake." *Ibid.* (internal quotation marks omitted). The court concluded that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are officers of the district court and are appointed by the Courts of Appeals." *Ibid.* (brackets and internal quotation marks omitted).

Although EBIA had repeatedly demanded a jury trial before the district court, the court of appeals concluded that EBIA, through its litigation conduct, had "impliedly consented" to adjudication by a bankruptcy judge. Pet. App. 29a–30a. That conclusion was based, at least in part, on the court of appeals' understanding that EBIA had "*petitioned* the district court to stay its consideration of the motion to withdraw the reference

to give the bankruptcy court time to adjudicate the Trustee's motion for summary judgment." *Id.* at 29a (emphasis added). This statement appears to be based on the joint status report filed with the district court in connection with EBIA's request to withdraw the reference in order to vindicate its jury trial right. See *id.* at 73a–76a. But EBIA did not join that status report, in which other parties reported to the district court that the Trustee intended to move for summary judgment in the bankruptcy court. See *id.* at 76a (indicating that counsel for EBIA had not joined the report).

The Ninth Circuit also emphasized that EBIA had not framed its objection explicitly in terms of Article III until after this Court decided *Stern*, which was after EBIA had filed its opening brief in the court of appeals. Pet. App. 30a. "Because it waited so long to object, and in light of its litigation tactics," the court held that "EBIA impliedly consented to the bankruptcy court's jurisdiction." *Ibid.* The court of appeals faulted EBIA for failing to anticipate this Court's holding in *Stern* on the basis of *Granfinanciera*, despite the court of appeals' own prior conclusion that *Granfinanciera*'s holding was limited to the conduct of jury trials. Pet. App. 15a; cf. *Healthcentral.com*, 504 F.3d at 788.

SUMMARY OF ARGUMENT

The decision of the court of appeals must be vacated because the bankruptcy court lacked constitutional authority to enter a final judgment of the United States and because EBIA's purported consent (consisting of failure to assert an argument foreclosed by binding circuit precedent) could not cure that constitutional defect.

I. The Constitution ensures the separation of powers by assigning the core legislative, executive, and judicial functions to the three branches of government. Diminishing or reallocating a particular branch's core constitutional functions, including even within a branch, violates the separation of powers. Neither an agreement among the branches of government nor the agreement of private parties can authorize such a departure from the Constitution's structural design.

The core function of the Judicial Branch is the authority to enter final judgment on private claims. That authority is confined by Article III, § 1 to judges appointed by the President with the consent of the Senate, and who have life tenure and protection from salary diminution. Assigning the core judicial function to non-Article III judges violates the separation of powers, as this Court held in *Stern* v. *Marshall*.

The consent of private parties cannot cure an Article III defect that implicates the separation of powers. Because *Stern* established that a bankruptcy judge's entry of final judgment on a private right violates the separation-of-powers component of Article III, the court of appeals erred in holding that it was cured by the implied consent or waiver of EBIA.

To the extent consent can be relevant to the separation-of-powers analysis at all, it is only insofar as Congress has made consent a limiting feature of the statute permitting non-Article III adjudication. A statutory requirement of consent ensures that litigants are made aware of the need to consent and their right to refuse it, and ensures that Congress has carefully considered the constitutional issues at stake. Further, by making consent a jurisdictional limitation on the

non-Article II tribunal, Congress also provides the basis for Article III oversight, to ensure, on appellate review, that consent to a non-Article III judge was knowing and voluntary. The provisions of the Bankruptcy Code governing core proceedings include no requirement of consent, however, and implied consent in an individual case provides none of the ameliorating functions of a statutory consent requirement. Individual litigant consent cannot cure the separation of powers defect identified by this Court in *Stern*.

Because the bankruptcy court's judgment was entered without constitutional authority, it must be vacated on appeal. Like a defect in subject matter jurisdiction, a violation of Article III, § 1 implicating the separation of powers goes to the authority of the court to enter judgment. It therefore cannot be cured by consent of the parties, and is an error correctable at any time on direct appeal.

II. Even if litigant consent were relevant (in the absence of a statutory requirement), such consent would still have to be knowing and voluntary. Failure to make an objection that is foreclosed by binding precedent does not constitute knowing and voluntary consent. Prior to *Stern*, both the Bankruptcy Code and controlling Ninth Circuit authority denied that litigants had a right to an Article III judge to decide summary judgment in core proceedings. Failure to object to entry of summary judgment by a bankruptcy judge could not, therefore, constitute knowing and voluntary consent.

The court of appeals' finding of implied consent demonstrates just how little protection will be afforded to the commands of Article III in the absence of a strict

requirement of knowing and voluntary consent. Without any such constraint, post-hoc judicial findings of implied consent—made in an effort to salvage unconstitutional adjudications by the bankruptcy courts—will render hollow this Court's holding in *Stern*. Because EBIA could not, prior to *Stern*, have knowingly and voluntarily consented to the bankruptcy court's entry of judgment, the judgment of the court of appeals must be vacated.

III. In addition to lacking constitutional authority to enter judgment, the bankruptcy court lacked statutory authority to issue proposed findings of fact and conclusions of law. The text and structure of Section 157(b) of Title 28, which governs core proceedings, plainly demonstrates that bankruptcy courts' authority to "hear and determine" core proceedings does not include authority to propose non-final findings and conclusions. The plain meaning of the word "determine" is to decide conclusively or authoritatively, not to propose a non-final recommendation. This plain meaning is confirmed by Section 158(b), which provides that bankruptcy appellate panels "hear and determine" appeals, a grant of authority not conceivably including the "lesser" action of issuing a "proposed ruling on appeal."

Moreover, construing Section 157(b) to permit issuance of proposed findings and conclusions also cannot be reconciled with Section 158. Section 158 grants district courts appellate jurisdiction over bankruptcy court judgments, but grants district courts no authority to enter judgment in the first instance in a case that has been referred to (and not withdrawn from) the bankruptcy court.

Nor can bankruptcy courts propose findings of fact and conclusions of law in core proceedings pursuant to other sections of the Bankruptcy Code. Section 157(c)(1) permits them to issue proposed findings and conclusions only in non-core, "related to" proceedings. Fraudulent conveyance proceedings are specifically denominated as core, and could only be adjudicated under Section 157(c)(1) through judicial rewriting of the statute. Nor can district courts exercise their power to refer cases under Section 157(a) by promulgating local rules or standing orders purporting to alter the specific procedures established by Congress for bankruptcy courts. Ultimately, it is the responsibility of Congress, not the courts, to choose among the multiple potential legislative remedies for the constitutional defect in the Bankruptcy Code that this Court identified in *Stern*.

ARGUMENT

I. THE ARTICLE III VIOLATION IDENTIFIED IN *STERN* V. *MARSHALL* CANNOT BE CURED BY LITIGANT CONSENT IN AN INDIVIDUAL CASE

A. The Constitutional Allocation Of Functions Among The Three Branches Of Government Cannot Be Altered By Agreement Between The Branches Or Wishes Of Private Parties

One of the defining features of the Constitution is its dispersion of federal power among "three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality opinion). Although "the three branches are not hermetically sealed from one another," the Constitution "imposes

some basic limitations," *Stern* v. *Marshall*, 131 S. Ct. 2594, 2609 (2011), and assigns to each branch certain core sovereign functions that cannot be allocated or exercised in a manner other than set forth in the Constitution, see *Loving* v. *United States*, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."); *Pacemaker Diagnostic Clinic of Am.* v. *Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) (the "separation of powers * * * requir[es] that each branch retain its *essential powers* and independence" (emphasis added)), cert. denied, 469 U.S. 824 (1984).

The core legislative power is the power to make laws of the United States. The Constitution commands that "the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure": bicameralism and presentment. *INS* v. *Chadha*, 462 U.S. 919, 951, 956–958 (1983).

The core executive powers include oversight of those executing laws enacted by Congress. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (" '[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.' ") (quoting James Madison, 1 Annals of Cong. 463 (1789)). That power cannot be conferred on a person or entity not accountable to the President. *Ibid.* (dual for-cause limitation on President's removal authority violates separation of powers).

The core judicial power "is one to render dispositive judgments" on private claims, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (internal quotation marks omitted), and particularly private claims heard by courts of law and equity at the time of the Constitution's adoption, see *Stern*, 131 S. Ct. at 2614–2615. That authority cannot be conferred on non-Article III judges. *Id.* at 2620 (entry of judgment on common-law counterclaim by bankruptcy court violates separation of powers); *Northern Pipeline*, 458 U.S. at 87 (plurality opinion).

The preservation of the separation of powers is secured by the structure of the Constitution, not the pleasure of any particular branch. A breach of the separation of powers violates the Constitution "whether or not the encroached-upon branch approves of the encroachment." *New York* v. *United States*, 505 U.S. 144, 182 (1992); see also *Free Enter. Fund*, 130 S. Ct. at 3155 ("[T]he separation of powers does not depend on the views of individual Presidents[.]"); *Clinton* v. *New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous."). Nor can agreement among the branches justify a deviation from the Constitution's requirements for how their respective authorities are to be exercised. See *Chadha*, 462 U.S. at 942 n.3 (statute violating requirements of bicameralism and presentment not "immunized" simply because it "was passed by Congress and approved by the President").

Contrary to the court of appeals' understanding, the separation of powers is not implicated only when there is a self-evident "encroachment or aggrandizement of one branch at the expense of the other." Pet.

App. 27a n.9 (internal quotation marks omitted). No less authority than *Marbury* v. *Madison* establishes that even attempts to reallocate authority *within* a branch of government are void when inconsistent with the Constitution's structural design. 5 U.S. (1 Cranch) 137, 175–176 (1803). There, the Court held invalid an attempt by Congress to confer original jurisdiction on this Court over matters in which the Constitution granted only appellate review. *Ibid.* There was no doubt in that case that original jurisdiction to issue a writ of mandamus against the Secretary of State could permissibly reside within the Judicial Branch. *Id.* at 173–174. Thus, there was no obvious risk of aggrandizing one branch's powers at the expense of another. Yet the Court recognized that if Congress could allocate to the Supreme Court original jurisdiction where it should only have appellate powers, Congress might equally allocate to the lower courts original jurisdiction where the Constitution reserved it to the Supreme Court. *Ibid.* Thus, "even with respect to challenges that may seem innocuous at first blush," the Court will not "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Stern*, 131 S. Ct. at 2620; *id.* at 2619–2620 (rejecting contention that appointment and supervision of bankruptcy judges by Article III judges ameliorated the "threat to the separation of powers").

Just as the three branches cannot alter the Constitution's allocation of authority, neither can private parties do so by agreement. In *Marbury*, tellingly, once the Court declared that the statute granting it original jurisdiction was inconsistent with Article III, it did not even inquire whether Mr. Marbury's willing invocation of the Court's jurisdiction and Secretary of State Madi-

son's failure to object made exercise of the power acceptable. 5 U.S. (1 Cranch) at 180 ("a law repugnant to the constitution is void"). And what was implicit in *Marbury* has since been made explicit many times over. Litigants "may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy' " under Article III. *Sosna* v. *Iowa*, 419 U.S. 393, 398 (1975). Nor can they agree to confer jurisdiction beyond the courts' statutory authority, even though Congress could have constitutionally conferred more expansive jurisdiction. *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382, 384 (1884) (noting, where there was an absence of complete diversity, that "the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted").

The assignment of core sovereign functions to each of the three branches is so central to the design of the Constitution that neither the consent of the affected branch, nor the consent of private parties—nor even the consent of both—can authorize the reallocation of those responsibilities.

B. Conferring On Non-Article III Bankruptcy Courts Authority To Render Judgments Of The United States Violates The Separation Of Powers

Rendering final judgments of the United States is the core power assigned to the Judicial Branch. The judicial power is " 'the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' " *Muskrat* v. *United States*, 219 U.S. 346, 355–356

(1911) (quoting Justice Samuel Miller, *On the Constitution* 314 (1891)); accord *Plaut*, 514 U.S. at 218–219. As the Court declared in *Stern*, rendering a final judgment on a private right is the "most prototypical exercise of judicial power." 131 S. Ct. at 2615.

The Judiciary exerts its authority as a co-equal branch of government by rendering judgment in the cases before it. See The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961) ("[The Judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."). A judgment, once final, "becomes the last word of the judicial department with regard to a particular case or controversy," *Plaut*, 514 U.S. at 227, and, as such, judgments of the United States carry great authority. They can declare invalid the acts of Congress. *Marbury*, 5 U.S. (1 Cranch) at 180. They "may not lawfully be * * * refused faith and credit by another Department of Government." *Chi. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948). They can direct the conduct of the States, even in areas of traditional local concern. See, *e.g.*, *Brown* v. *Bd. of Educ.*, 349 U.S. 294 (1955). And they can affect countless aspects of the affairs of private citizens and noncitizens alike. See *O'Donoghue* v. *United States*, 289 U.S. 516, 532 (1933) (" 'The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all.' " (quoting Chief Justice John Marshall, *Debates of the Virginia State Convention of 1829–1830* at 616)).

The Framers were acutely aware of the potential for conflict that exists when courts render final judgments disfavored by the political branches or other

powerful interests. A "crescendo of legislative interference with private judgments of the courts" prompted the Framers to make the "critical decision to establish a judicial department independent of the Legislative Branch." *Plaut*, 514 U.S. at 221. They recognized that, although the Judicial Branch was likely to be the "weakest of the three departments of power," the exercise of national judicial power would be dangerous unless "the judiciary remains truly distinct from both the legislature and the Executive." The Federalist No. 78, at 465–466. "The complete independence of the courts of justice" was thus deemed "peculiarly essential in a limited Constitution." *Id.* at 466.

The independence of the Judiciary is ensured by Article III's tenure and salary protections. Tenure during "good Behaviour" was deemed essential because "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges'] necessary independence." The Federalist No. 78, at 471. And because the "*power over a man's subsistence amounts to a power over his will*," the Framers believed that "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision of their support." The Federalist No. 79, at 472 (Alexander Hamilton).

Entry of final judgments by non-Article III bankruptcy courts implicates the same concerns that underlie the Constitution's separation of powers. Like the judgments of Article III courts, bankruptcy court judgments carry the full force of a judgment of the United States. They can be registered in another judicial district, 28 U.S.C. 1963, must be honored in state court proceedings, see *Stern*, 131 S. Ct. at 2602, and can be enforced through writs of execution issued by the

bankruptcy judge, Fed. R. Bankr. P. 7069. In some circumstances, bankruptcy judgments can be appealed directly to the courts of appeals. 28 U.S.C. 158(d)(2). And because bankruptcy courts' "substantive jurisdiction reach[es] any area of the *corpus juris*," *Stern*, 131 S. Ct. at 2615, their judgments carry the same risks of political conflict as those of district courts. Through their judgments, bankruptcy courts can direct the conduct of the political branches, see 11 U.S.C. 106, pass on the constitutionality of acts of Congress, see *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011), and bind the States, see *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006).

Although bankruptcy court judgments carry all the attendant risks of district court judgments, bankruptcy judges have none of the Constitution's structural protections. They are not nominated by the President or confirmed by the Senate, but rather are appointed by circuit court judges. 28 U.S.C. 152(a)(1). They are not insulated by life tenure, but rather are appointed for a term of years and subject to removal for cause, 28 U.S.C. 152(a), (e). Nor are they protected against salary diminution. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion) (even a "statutory declaration" that judges should serve "with undiminished salary * * * [is] ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III").

Precisely because bankruptcy judges do not meet the qualifications of judges under Article III, this Court "emphatic[ally]" declared in *Stern* that the entry of final judgments on private rights by bankruptcy judges poses a "threat to the separation of powers" and violates Article III. 131 S. Ct. at 2620. As in *Marbury*, it

did not matter in *Stern* that this extra-constitutional allocation of responsibility arguably took place within Article III. That bankruptcy judges are appointed by the courts of appeals and decide only those cases that have been referred to them by the district courts did not alter the Court's conclusion. "[T]he 'essential attributes of judicial power' " must be "reserved to Article III courts." *Schor*, 478 U.S. at 851. Thus, "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings [over private claims]. The constitutional bar remains." *Stern*, 131 S. Ct. at 2619 (citing The Federalist No. 78, at 471). Permitting bankruptcy courts to enter final judgment in such proceedings would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Id.* at 2620.

C. Private Litigants Cannot, By Consent Or Waiver, Confer On Non-Article III Bankruptcy Courts Authority To Enter Judgment In Violation Of The Separation Of Powers

Stern established that Congress violated Article III and the separation of powers by granting bankruptcy judges authority to enter final judgment in traditional private actions. Because the bankruptcy courts' authority to enter final judgment implicates the structural separation of powers, it cannot be overcome by consent or waiver, for the same reasons subject matter jurisdiction cannot be conferred in such fashion.

1. Consent cannot cure structural Article III violations affecting the separation of powers, such as that identified in *Stern*

In *Commodity Futures Trading Commission* v. *Schor*, the Court held that a violation of Article III implicating the separation of powers cannot be waived or cured by litigant consent. 478 U.S. at 850–851. Although the Court indicated that Article III, § 1 in part protects purely personal interests that can be waived, *id.* at 848, it also observed that "Article III, § 1 * * * serves as 'an inseparable element of the constitutional system of checks and balances' " that "safeguards the role of the Judicial Branch in our tripartite system," *id.* at 850 (quoting *Northern Pipeline*, 458 U.S. at 58 (plurality opinion)). The Court declared that "[t]o the extent that this structural principle [*i.e.*, Article III, § 1's protection of the separation of powers] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850–851; accord *Freytag* v. *Comm'r Internal Revenue*, 501 U.S. 868, 897 (1991) (Scalia, J., concurring in part and concurring in the judgment); *Glidden*, 370 U.S. at 535–536 (plurality opinion) (declaring that "disruption to sound appellate process entailed by entertaining [Article III] objections not raised below * * * is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"); *Pacemaker*, 725 F.2d at 544 ("Statutes or governmental actions which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, despite waiver by affected private parties."). "When

these Article III limitations are at issue," *Schor* explained, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." 478 U.S. at 851.

The dissenting opinion of Justice Brennan in *Schor*, joined by Justice Marshall, would have gone further. In Justice Brennan's view, "the structural and individual interests served by Article III are inseparable," and therefore, in all cases, "consent is irrelevant to Article III analysis." *Schor*, 478 U.S. at 867. Notably, however, all nine Justices agreed that, wherever adjudication by non-Article III courts implicates the separation of powers, the consent or waiver of individual litigants cannot cure the constitutional difficulty. See *id.* at 850–851 (majority opinion); *id.* at 867 (Brennan, J., dissenting).

Stern conclusively established that the provisions of the Bankruptcy Code governing core proceedings, which purport to grant bankruptcy courts authority to enter final judgments of the United States on private rights, violate the structural, separation-of-powers component of Article III. Indeed, *Stern* "emphatic[ally]" declared that permitting bankruptcy courts to enter final judgment in core proceedings involving private rights would "compromise the integrity of the system of separated powers and the role of the Judiciary within that system." 131 S. Ct. at 2620; accord *Wellness Int'l Network, Ltd.* v. *Sharif*, ---F.3d---, No. 12-1349, 2013 WL 4441926, at *17 (7th Cir. Aug. 21, 2013) ("*Stern* unequivocally holds that 28 U.S.C. § 157(b) violates the structural protections of Article III, § 1 * * * .").

Under *Schor*, therefore, "the parties cannot by consent cure the constitutional difficulty" identified in *Stern*. 478 U.S. at 850–851. *Stern* recognized as much in declaring that, because "the bankruptcy court itself exercises the essential attributes of judicial power that are reserved to Article III courts, *it does not matter who * * * authorized the judge to render final judgments in such proceedings*." 131 S. Ct. at 2619 (emphasis added) (citation and internal quotation marks omitted). *Stern* and *Schor* together establish that the consent or waiver of litigants in an individual case is insufficient to confer on non-Article III bankruptcy courts authority to enter final judgment on private rights. See *Wellness Int'l*, 2013 WL 4441926, at *17 (relying on *Schor* and *Stern* to conclude Article III objection to bankruptcy-court adjudication could not be waived); *Waldman* v. *Stone*, 698 F.3d 910, 918 (6th Cir. 2012) (same), cert. denied, 133 S. Ct. 1604 (2013).

Because "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article," Congress's purported assignment of "the essential attributes of judicial power" was void as violating "[t]he constitutional bar." *Stern*, 131 S. Ct. at 2618–2620. It makes no more sense to ask whether private litigants have consented to the unconstitutional reassignment of Article III authority under Bankruptcy Code Section 157(b) than it would to have asked whether Secretary Madison had consented (or waived by objections) to this Court's exercise of original jurisdiction in *Marbury*. See 5 U.S. (1 Cranch) at 180.

2. Even assuming consent can be relevant to the constitutional inquiry when Congress confers authority to enter final judgments on non-Article III courts, it is only to the extent that consent is a limiting feature of the statutory scheme

For the reasons above, it is doubtful that litigant consent can ever be the determining factor in the constitutionality of a non-Article III judge's exercise of the essential attributes of the judicial power of the United States. To the extent litigant consent is ever relevant to the structural analysis, it is only insofar as Congress included a *statutory* requirement of consent that diminishes separation-of-powers concerns.

a. *Whereas a statutory consent requirement might diminish a potential threat to the separation of powers, ad-hoc litigant consent cannot validate adjudication under an unconstitutional statute*

Schor recognized that "the parties cannot by consent cure" structural violations of the separation of powers. 478 U.S. at 850–851. The Court has, however, at times given some consideration to the role of consent within a statutory scheme in evaluating whether a statute's limited delegation of judicial authority violates the separation of powers in the first place. See, *e.g.*, *id.* at 855.

Thus, in *Schor* itself, the Court discussed consent in analyzing the structural component of Article III in connection with determining whether the adjudicatory authority of the Commodity Futures Trading Commission (CFTC) threatened the separation of powers. See

478 U.S. at 855. The Court observed that the CFTC's authority over counterclaims in CFTC reparation proceedings was "left entirely to the parties." *Ibid.*[1] The inclusion of consent as a feature of the statute was significant, the Court explained, because "separation of powers concerns are diminished" where "Congress * * * make[s] available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Ibid.*; accord *Wellness Int'l*, 2013 WL 4441926, at *17 (distinguishing core bankruptcy proceedings from statutory schemes that explicitly require consent); *Pacemaker*, 725 F.2d at 546 (holding that the "statutory safeguard[]" of litigant consent "is essential to the constitutionality of the [Magistrates] Act").

Ultimately *Schor* held that entry of reparation orders by the CFTC did not violate the separation of powers. See 478 U.S. at 857 (finding "no genuine threat to [separation of powers] principles to be present"); *ibid.* (holding that CFTC counterclaim "adjudication does not contravene separation of powers principles or Article III"). In reaching that conclusion the Court relied on a number of factors, including the statutory requirement of consent. See *id.* at 855. The Court also emphasized that the CFTC's orders (unlike bankruptcy judgments) were "enforceable only by order of the dis-

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[1] In *Schor*, the consent of both parties was ensured by the structure of the statute: a counterclaim-defendant manifested its consent by initiating a reparation action before the CFTC, and a counterclaim-plaintiff manifested its consent by voluntarily electing to bring its counterclaim in that forum. See 478 U.S. at 841–843 (observing that CFTC's authority to adjudicate counterclaims "is evident on the face of the statute").

trict court," see *id.* at 853, and further observed that the CFTC scheme dealt with a "particularized area of law," *id.* at 852; that the CFTC's orders were "reviewed under the same 'weight of the evidence' standard sustained in *Crowell* [v. *Benson*, 285 U.S. 22 (1932)], rather than the more deferential standard found lacking in *Northern Pipeline*," *id.* at 853; and that the CFTC's counterclaim jurisdiction was "limited to that which [was] necessary to make the reparations procedure workable," *id.* at 856. *Schor* thus concluded that the CFTC scheme "hew[ed] closely to the agency model approved by the Court in *Crowell*," *id.* at 852, in which the agency "functioned as a true 'adjunct' of the District Court," *Stern*, 131 S. Ct. at 2613 n.6.

The Court has likewise considered litigant consent in upholding the assignment of some judicial responsibility to Article III adjuncts.[2] But it has done so only where, as in *Schor*, the "essential attributes of judicial power" remained with an Article III court. 478 U.S. at 852; see, *e.g.*, *Gonzalez* v. *United States*, 553 U.S. 242, 252 (2008); *Peretz* v. *United States*, 501 U.S. 923, 937 (1991) (magistrates may preside over *voir dire* with consent because " 'the entire process takes place under

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[2] The Court has also discussed litigant consent in upholding non-Article III adjudication of so-called "public rights" that are "integrally related to particular federal government action." *Stern*, 131 S. Ct. at 2613; see, *e.g.*, *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (holding that it was permissible for Congress to assign the valuation task within a federal compensation scheme outside Article III courts). As the court of appeals correctly concluded, the fraudulent conveyance claims asserted against EBIA do not qualify as public rights. Pet. App. 15a; see *Granfinanciera*, 492 U.S. at 54.

the district court's total control and jurisdiction' " and both the ultimate decision whether to empanel the jury and the further conduct of the trial and entry of judgment remain with the district court (quoting *United States* v. *Raddatz*, 447 U.S. 667, 681 (1980))); *Thomas* v. *Arn*, 474 U.S. 140, 142, 154 (1985) (waiver of objections to proposed findings of fact and conclusions of law does not "remove[] the essential attributes of the judicial power" from Article III courts because the district judge "retains full authority * * * to enter judgment") (internal quotation marks omitted); *Kimberly* v. *Arms*, 129 U.S. 512, 524–525 (1889) (master's report was entitled to deference, but final authority to enter judgment remained with court); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 128 (1864) (affirming judgment entered by court upon unobjected-to referee's report, where parties consented to referee acting in place of the jury).[3] The foregoing decisions cannot control the outcome here, however, because "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals." *Stern*, 131 S. Ct. at 2619.

To the extent the Court has implied that consent might be relevant to the constitutionality of a statute that assigns non-Article III judges the power to enter final judgments of the United States, the consent in

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[3] The court of appeals cited *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), as holding that "the right to an Article III judge in plenary proceedings [under the Bankruptcy Act of 1898] could be waived by the litigants." Pet. App. 27a. But "*MacDonald* was decided on statutory grounds" and "did not mention the Constitution, let alone Article III, § 1." *Wellness Int'l*, 2013 WL 4441926, at *17 n.2.

question was an inherent, limiting feature of the non-Article III judge's statutory jurisdiction. This Court has never squarely addressed the constitutionality the Federal Magistrates Act, which authorizes magistrate judges, acting with the parties' consent, to enter final judgments of the United States, directly appealable to the court of appeals "in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. 636(c)(3).[4] But, to the extent the Court has suggested that the Magistrates Act's authorization of consensual reference to magistrates for entry of final judgment is constitutional, that statute is distinctive in that it makes consent an explicit, statutory limitation on the non-Article III judge's jurisdiction. 28 U.S.C. 636(c)(1). Unlike the Magistrates Act, the Bankruptcy Code does not require consent as a condition to bankruptcy judges' authority to enter final judgment in core proceedings. See 28 U.S.C. 157(b).

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[4] In *Roell* v. *Withrow*, the Court repeatedly emphasized that "the *only* question" before it was the *statutory* question "whether [implied consent] can count as conferring 'civil jurisdiction' under § 636(c)(1), or whether adherence to the letter of § 636(c)(2) is an absolute demand." 538 U.S. 580, 586–587 (2003) (emphasis added); see also, *e.g.*, *id.* at 587 n.5. In holding, as a matter of statutory construction, that implied consent can satisfy Section 636(c)(1), the Court did not address the "serious constitutional concerns" raised by the dissent concerning entry of judgment by a magistrate. *Id.* at 592 (Thomas, J., dissenting). In *Peretz*, which concerned the magistrate's conduct of jury *voir dire*, the Court noted magistrate judges' statutory authority to preside over trials with litigant consent. 501 U.S. at 933, 935 n.12. But *Peretz*'s holding did not address the constitutionality of that provision. See *id.* at 953 (Scalia, J., dissenting) (observing that no question of jurisdiction was presented because judgment was entered by the district court).

Thus, whereas the limiting character of the statutory consent requirement might in a future case play a role in deciding whether the Magistrates Act is constitutional, the absence of consent as a statutory feature was already part of the Court's analysis in *Stern* concluding that Section 157(b) was *not* constitutional. See 131 S. Ct. at 2614–2615 & n.8. Where this Court has already held that the statute conferring authority to enter judgment unconstitutionally violates the separation of powers, the mere preferences of private litigants cannot "cure the constitutional difficulty" in an individual case. *Schor*, 478 U.S. at 851; see *Marbury*, 5 U.S. (1 Cranch) at 180.

b. ***Insisting that consent be expressly included in the statute ensures that it will serve as a limiting feature on the bankruptcy court's authority to enter judgment***

Where Congress enacts a statute that specifically conditions non-Article III courts' authority to enter judgment on consent of the litigants, the threat to the separation of powers is potentially diminished.

First, a statutory requirement of consent ensures that litigants are "made aware of the need for consent and the right to refuse it." *Roell*, 538 U.S. at 590. Statutory notice assures that any supposed consent is knowing and voluntary, and thereby guarantees that unsuspecting litigants are not deprived of the protections afforded by Article III. See, *e.g.*, 28 U.S.C. 636(c)(2) ("Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.").

Second, Congress's inclusion of consent as a statutory requirement demonstrates that Congress "has in fact faced, and intended to bring into issue," the serious constitutional questions raised by non-Article III adjudication. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted). "In traditionally sensitive areas, such as legislation affecting the federal balance," and legislation implicating the separation of powers, the Court has for this reason required a "clear statement" from Congress. *Ibid.* (internal quotation marks omitted); see *Kucana* v. *Holder*, 558 U.S. 233, 237 (2010) (applying clear statement rule in light of "[s]eparation-of-powers concerns"). By including a consent limitation in a statute assigning judicial powers to non-Article III courts, Congress demonstrates an awareness of the sensitive constitutional ground on which it treads, and its attempt to navigate it with care. See, *e.g.*, 28 U.S.C. 157(c)(2); 28 U.S.C. 636(c)(1); see also *Pacemaker*, 725 F.2d at 542 (giving "considerable weight to the judgment of Congress that consent of the parties eliminates constitutional objections").

Third and finally, by including consent as a jurisdictional limit in the statute it enacts, Congress ensures that a non-Article III court *cannot* proceed without the parties' knowing consent, and if it does its error will be correctable on appeal. This is true, for example, with the Magistrates Act. See 28 U.S.C. 636(c)(1). In *Roell*, because the dissenting Justices believed litigant consent to magistrate adjudication was lacking, they went on to consider whether that defect in the magistrate's authority was jurisdictional and could be raised *sua sponte* by the court on appeal. 538 U.S. at 597–598 (Thomas, J. dissenting). The dissent concluded that "[a]bsence of consent means absence of a 'judgment,' "

and therefore "absence of consent is a jurisdictional defect" that the court of appeals must raise *sua sponte*. *Id.* at 598, 599; *Gomez* v. *United States*, 490 U.S. 858, 870 (1989) (observing that a "critical limitation on [magistrates'] expanded jurisdiction is consent" and that "the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent"). Subsequent to *Roell*, the courts of appeals, including the Ninth Circuit, have concluded that consent is a jurisdictional prerequisite to entry of judgment by a magistrate judge, and its absence is correctable whenever noted on appeal. See, *e.g.*, *Yeldon* v. *Fisher*, 710 F.3d 452, 453 (2d Cir. 2013) ("lack of consent is a jurisdictional defect that cannot be waived"); *Stevo* v. *Frasor*, 662 F.3d 880, 884 (7th Cir. 2011) ("If the parties have not given valid consent to entry of judgment by a magistrate judge, we treat the purported judgment as not final so that we lack appellate jurisdiction."); *Anderson* v. *Woodcreek Venture Ltd.*, 351 F.3d 911, 914 (9th Cir. 2003) ("Our appellate jurisdiction * * * depends on the magistrate judge's lawful exercise of jurisdiction." (citing *Roell*, 538 U.S. at 598 (Thomas, J., dissenting)).[5]

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[5] A passing reference in *Stern* suggests that consent is not a jurisdictional prerequisite to a bankruptcy court's authority to enter final judgment under Section 157(c)(2). 131 S. Ct. at 2607. That dictum is in tension with the Court's acknowledgement elsewhere that Section 157 defines the subject matter jurisdiction of bankruptcy courts. See *Kontrick* v. *Ryan*, 540 U.S. 443, 452–453 (2004). The Court need not resolve here whether consent is a jurisdictional requirement of Section 157(c)(2) or whether a non-jurisdictional statutory consent requirement could sufficiently ameliorate separation of powers concerns to affect the Article III analysis. The bankruptcy court entered judgment in this core pro-

In these respects a statutory consent requirement arguably ameliorates the threat to Article III values of a statute that assigns a non-Article III judge authority to enter judgments of the United States. Even assuming a statutory consent requirement could properly influence the constitutional analysis for these reasons, mere post-hoc determinations of implied consent by litigation conduct can serve none of those limiting functions.

3. Where the bankruptcy court's judgment was entered without constitutional authority in violation of the separation of powers, it must be vacated on appeal

Stern held the provisions of the Bankruptcy Code governing core proceedings violate the separation of powers insofar as they permit bankruptcy courts to enter judgment on private rights. Litigant consent in an individual case therefore cannot cure the constitutional violation. A private party's consent or waiver may no more confer on a non-Article III judge authority to exercise the judicial power of the United States than it can confer on Article III courts the authority to adjudicate claims beyond their constitutionally or legislatively established subject matter jurisdiction.

A defect in subject matter jurisdiction is correctable at any time on direct appeal because it implicates "the courts' statutory or constitutional *power* to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). And because subject matter jurisdiction

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ceeding pursuant to Section 157(b), which contains no consent limitation whatsoever.

"involves a court's power to hear a case, it can never be forfeited or waived." *Ibid.* ("defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court").

For the same reasons that subject matter jurisdiction is correctable at any time on direct appeal, so too are violations of Article III, § 1 that implicate the separation of powers, including the violation that occurred here. Just like a defect in subject matter jurisdiction, such violations go to the bankruptcy court's "constitutional authority" to enter judgment. *Stern*, 131 S. Ct. at 2601 (concluding that bankruptcy court "lacked constitutional authority" "to enter judgment on Vickie's counterclaim"). Absence of authority to enter judgment "means absence of a 'judgment,'" which, in turn, "destroys jurisdiction of a court * * * reviewing" that judgment. *Roell*, 538 U.S. at 597–598 (Thomas, J., dissenting); see *Ortiz* v. *Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011) (appellate jurisdiction absent where bankruptcy judge lacked authority under Article III to enter final judgment after *Stern*). Under the Bankruptcy Act, "[t]he district courts * * * have jurisdiction to hear appeals * * * from final judgments * * * of bankruptcy judges entered * * * under section 157." 28 U.S.C. 158(a). The district court exercised such appellate jurisdiction in this case. See J.A. 28 (notice of appeal to district court); Pet. App. 41a (noting appellate jurisdiction); J.A. 188 (affirming judgment of bankruptcy court and dismissing appeal). And if the district court lacked appellate jurisdiction for want of a final judgment, so did the court of appeals. See, *e.g.*, *Mort Ranta* v. *Gorman*, 721 F.3d 241, 245 (4th Cir. 2013) ("Both the district court order and the bankruptcy court order must be final for our jurisdiction to

be proper under § 158(d)(1)."); *ASARCO, Inc.* v. *Elliott Mgmt. (In re ASARCO, LLC)*, 650 F.3d 593, 599 (5th Cir. 2011) ("[The district court's] jurisdiction—as well as our own—depends on the finality of the bankruptcy order appealed from.").

II. Even If Consent Could Cure The Constitutional Violation Identified In *Stern*, Such Consent Must Be Knowing And Voluntary, Unlike The Purported Consent Here

Even if consent in an individual case were relevant to the question whether a non-Article III judge may enter final judgment of the United States, such consent would need to be knowing and voluntary. Mere failure to assert an argument foreclosed by binding precedent, as in this case, could not confer on the bankruptcy judge constitutional authority that Article III otherwise forbids.

No such knowing and voluntary consent could be found in this case. EBIA consistently and repeatedly invoked the only right it had under binding precedent to get before a district court, the right to jury trial. Yet the court of appeals found that EBIA had impliedly consented to final adjudication of the claims against it by the bankruptcy court (or alternatively waived objection thereto) by failing to anticipate that this Court would overrule circuit precedent in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and therefore failing to object when other parties reported that pretrial proceedings (including ruling on a forthcoming summary judgment motion) remained to be conducted in the bankruptcy court before any trial might be necessary. The court of appeals' holding demonstrates well the risk to Article III values if post-hoc findings of "implied consent"

based on "litigation conduct" can trump this Court's constitutional holding in *Stern*.

A. Only Consent That Is Knowing And Voluntary Is Capable Of Conferring Judicial Authority On A Non-Article III Judge

Even if entry of a judgment by a non-Article III bankruptcy court were constitutionally permissible in the absence of a statutory consent requirement based solely on the litigants' consent to such adjudication in the individual case, only knowing and voluntary consent could supply the otherwise missing constitutional authority. Where consent is a statutory prerequisite to authority to enter judgment, this Court has made clear that only knowing and voluntary consent can satisfy the requirement. And no less would be acceptable to confer constitutional authority.

In *Roell* v. *Withrow*, where consent was an explicit feature of the Federal Magistrates Act, the Court repeatedly emphasized that litigants must voluntarily consent to proceed before a magistrate with awareness of the "need to consent and the right to refuse it." 538 U.S. 580, 590 (2003); *id.* at 587 & n.5 ("Certainly, notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent * * * ."); see also *id.* at 595 (Thomas, J., dissenting) (arguing that express consent is required to ensure "that the parties knowingly and voluntarily waive their right to an Article III judge"); *Pacemaker Diagnostic Clinic of Am.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (en banc) (Kennedy, J.) (holding that consent to adjudication by a magistrate judge must be "freely and voluntarily" given and that the Magistrates Act "recognizes the importance of this requirement and provides that

'rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties consent' " (quoting 28 U.S.C. 636(c)(2)). Likewise, in *Commodity Futures Trading Commission* v. *Schor*, the Court concluded that "Schor effectively agreed to an adjudication by the CFTC" only after observing that he had asserted a claim in that forum with "full knowledge" that the CFTC would exercise jurisdiction over a counterclaim against him. 478 U.S. 833, 850 (1986). Indeed, as discussed *supra*, a statutory requirement of consent has even been construed as a jurisdictional prerequisite that cannot be waived. See, *e.g.*, *Roell*, 538 U.S. at 597–598 (Thomas, J., dissenting).[6]

Where the prerequisite of litigant consent derives not from a statute but instead directly from the requirements of Article III, it would be perverse to conclude that something *less* than knowing and voluntary consent is sufficient to confer on a non-Article III court constitutional authority to enter the judgment of the United States. Cf. *Glidden Co.* v. *Zdanok*, 370 U.S.

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[6] The Court has extended similar treatment to other statutes that incorporate the requirements of Article III, § 1 even without determining if they are specifically jurisdictional. See *Nguyen* v. *United States*, 539 U.S. 69, 81 (2003) (refusing to treat as waived defendants' objections to participation of non-Article III judge on Ninth Circuit panel). In *Nguyen*, this Court observed that "Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern," *id.* at 80 (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57–60 (1982)), and therefore "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in consideration of their appeals * * * such a stipulation would not have cured the plain defect in the composition of the panel," *ibid.*

530, 536 (1962) (plurality opinion) (where violation of a statute "embod[ying] a strong policy concerning the proper administration of judicial business" is treated as jurisdictional, then "[a] fortiori is this so when the challenge is based on nonfrivolous constitutional grounds"). Thus, if consent in an individual case (where the statute did not require it) could ever be sufficient to confer constitutional authority on a non-Article III court, this Court should require that such consent be provided knowingly and voluntarily.

B. Failure To Assert An Argument Foreclosed By Binding Precedent, As Here, Does Not Constitute Knowing And Voluntary Consent

This Court has found knowing and voluntary consent to proceed before a non-Article III tribunal where the statute itself makes litigants aware of the "need for consent and the right to refuse it." See *Roell*, 538 U.S. at 590; *Schor*, 478 U.S. at 849–850; accord *Pacemaker*, 725 F.2d at 543. EBIA had no such notice. The provisions of the Bankruptcy Code governing core proceedings unconstitutionally purport to confer on the bankruptcy court complete authority to enter judgment even in the absence of consent. 28 U.S.C. 157(b). And, prior to *Stern*, the law in the Ninth Circuit squarely foreclosed any argument that bankruptcy courts lacked authority to enter summary judgment against the defendant in core proceedings, including on fraudulent conveyance claims. In *Duck* v. *Munn (In re Mankin)*, the Ninth Circuit held that Section 157(b)'s assignment of fraudulent conveyance claims against non-creditors to final adjudication by a bankruptcy judge did not violate Article III, even where the defendant objected. 823 F.2d 1296, 1309 (1987). Even after this Court held in *Granfinanciera S.A.* v. *Nordberg*, 492 U.S. 33, 43–49

(1989), that the Seventh Amendment entitles a defendant in a fraudulent conveyance action to a jury trial before a district judge, the Ninth Circuit held unambiguously, in *Sigma Micro Corp.* v. *Healthcentral.com (In re Healthcentral.com)* that "the bankruptcy court may retain jurisdiction over the action for pre-trial matters," including disposition on summary judgment. 504 F.3d 775, 788 (2007). In light of this authority, it is unsurprising that the court of appeals itself acknowledged below that, before *Stern*, the bankruptcy court's adjudication of this case would have been "routine and uncontroversial." Pet. App. 9a.

Where an argument that was foreclosed by controlling precedent becomes tenable only following an intervening change in law, failure to assert it sooner cannot be deemed a knowing and voluntary choice. See *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 143–144 (1967) (opinion of Harlan, J.) (entertaining constitutional defense raised on appeal where, prior to intervening decision of *New York Times* v. *Sullivan*, "there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny"); *id.* at 173 n.1 (separate opinion of Brennan, J.); *Big Horn County Elec. Co-op., Inc.* v. *Adams*, 219 F.3d 944, 953 (9th Cir. 2000) ("[A]n exception to the waiver rule exists for intervening changes in the law." (citing *Curtis Publ'g*, 388 U.S. at 142–143)); accord *Hawknet, Ltd.* v. *Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (entertaining personal-jurisdiction argument raised on appeal where, prior to intervening decision, "an argument that the court lacked jurisdiction over defendant would have been directly contrary to controlling precedent in this Circuit").

The failure, prior to *Stern*, of litigants in the Ninth Circuit to object to the pretrial adjudication of core proceedings by a bankruptcy judge cannot, therefore, constitute knowing and voluntary consent. Nothing made litigants aware of the need to consent or their right to refuse it. *Roell*, 538 U.S. at 590; *id.* at 587 n.5 ("notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent"). To the contrary, both the statute and controlling precedent provided that consent was irrelevant to the bankruptcy courts' authority to enter judgment in core proceedings.

C. The Court Of Appeals' Finding Of Implied Consent Demonstrates That A Standard Of Knowing And Voluntary Consent Is Essential To Safeguard This Court's Constitutional Holding In *Stern*

Despite controlling law denying EBIA any right to object, the court of appeals found that EBIA's failure to object to the bankruptcy court entering judgment amounted to "implied consent." Pet. App. 30a. The court thus upheld a judgment that it acknowledged would otherwise violate Article III and this Court's decision in *Stern*. *Id.* at 8a–23a. The court of appeals' reasoning demonstrates just how far the concept of implied consent can and will be stretched if knowing and voluntary consent were not required—and how *Stern*'s constitutional holding would be rendered hollow.

Far from consenting to bankruptcy-court adjudication, EBIA repeatedly asserted the only right to an Article III tribunal then available to it: the right to a jury trial before an Article III court under *Granfinanciera*. See J.A. 94 (jury demand); Pet. App. 77a–79a. And

EBIA specifically acknowledged Ninth Circuit precedent holding that, despite EBIA's valid jury demand, " 'the bankruptcy court may retain jurisdiction over the action for pretrial matters.' " Pet. App. 79a (citing *Healthcentral.com*, 504 F.3d at 788). Following the bankruptcy court's referral to the district court of EBIA's motion to withdraw the reference in order to hear the trial, several parties (not including EBIA) reported the Trustee's intent to file a summary judgment motion before the bankruptcy court. See Pet. App. 73a–76a. EBIA registered no objection to the bankruptcy court hearing and deciding the summary judgment motion because it could not object; Ninth Circuit precedent unambiguously empowered the bankruptcy court to decide the motion and dispose of the case before trial. *Healthcentral.com*, 504 F.3d at 788.

From these facts, the court of appeals concluded that EBIA had "petitioned the district court to stay its consideration of the motion to withdraw the reference," Pet. App. 29a, apparently not realizing that EBIA did not join in the status report noting others' intent to move for summary judgment before the bankruptcy court, *id.* at 76a. The court of appeals also inferred consent from EBIA's "litigation tactics" in failing to raise a constitutional objection that was foreclosed by binding circuit precedent until after this Court decided *Stern*. Pet. App. 30a. According to the court of appeals, EBIA should have foreseen *Stern*'s outcome based on *Granfinanciera* and the Ninth Circuit's panel decision in *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011).

Such an inference is unwarranted and unfair. Even following *Granfinanciera*, the Ninth Circuit itself held that the right to a jury trial before an Article III

judge did *not* deprive bankruptcy courts of authority to dispose of a case on summary judgment. *Healthcentral.com*, 504 F.3d at 788. Moreover, although *Mankin* was decided before *Granfinanciera*, the Ninth Circuit never overruled *Mankin* in the decades between *Granfinanciera* and *Stern*. And in overruling *Mankin* in this very case, the court of appeals relied heavily on the reasoning of *Stern*. See Pet. App. 9a ("[U]ntil quite recently, the exercise of that statutory authority [to enter final judgment in fraudulent conveyance proceedings] was routine and uncontroversial. But following the Supreme Court's decision in *Stern v. Marshall*, the view that such judgments are consistent with the Constitution is no longer tenable.") (citations omitted). Any suggestion that *Granfinanciera* alerted Ninth Circuit litigants to the Article III defect identified in *Stern* is revisionist history.

Nor did EBIA impliedly consent by failing to raise an Article III objection during the 26 days between the Ninth Circuit's panel decision in *Marshall* and the bankruptcy court's grant of summary judgment against EBIA, see J.A. 23. In *Marshall*, attempting to heed this Court's decision in *Northern Pipeline*, the court of appeals held that the counterclaim at issue was not a "core" proceeding. 600 F.3d at 1057, 1058–1059. Fraudulent conveyance claims, however, the Ninth Circuit had already held following *Northern Pipeline*, *are* "core" proceedings and could be finally decided by a bankruptcy court. *Mankin*, 823 F.2d at 1299–1310. *Marshall* did not purport to overrule *Mankin* (or *Healthcentral.com*). See generally 600 F.3d 1037. Indeed, the Ninth Circuit continued to adhere to *Healthcentral.com* after *Marshall*. See, *e.g.*, *PDG Los Arcos, LLC* v. *Adams*, 436 F. App'x 739, 743 (2011)

(unpublished). In short, nothing in *Granfinanciera* or *Marshall* would have made EBIA "aware of the need for consent and the right to refuse it." See *Roell*, 538 U.S. at 590.

The court of appeals' finding of "implied consent" here demonstrates the disregard of Article III's commands that can result from the absence of a robust requirement of knowing and voluntary consent. This Court recognized in *Stern* that even the mildest of intrusions on Article III cannot be overlooked. 131 S. Ct. at 2620. But the court appeals' attempt to salvage an unconstitutional adjudication here manifests evident disregard for the Article III values at stake. To sustain *Stern*'s constitutional holding, this Court should insist that, at a minimum, non-Article III adjudication be based on litigants' knowing and voluntary consent—consent that did not exist here.

III. BANKRUPTCY JUDGES LACK STATUTORY AUTHORITY TO ISSUE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CORE PROCEEDINGS

The lower courts, including the court of appeals in this case, have improperly sought to fill a statutory "gap," Pet. App. 23a, left by this Court's holding in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). The "gap" in question is the fact that "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." Pet. App. 23a–24a. The task of filling that "gap"—or crafting a constitutional alternative to the existing partially unconstitutional framework—belongs to Congress, not the courts. The sheer multiplicity of ways in which the lower courts have attempted to "fill

the gap" is testament to the fact that deciding how, if at all, to correct the problem is a choice that must be left to Congress.

Neither Section 157(b), nor Section 157(c), nor Section 157(a) provides a basis upon which bankruptcy courts may render non-final recommendations in connection with core bankruptcy proceedings referred to them by the district court. Section 157(b) authorizes the bankruptcy court only to enter final orders and judgments, not proposed findings, in core proceedings referred to them by the district court. And district court review is available only on appeal from those orders and judgments. 28 U.S.C. 157(b)(1); 28 U.S.C. 158(a). Section 157(c), on the other hand, does allow bankruptcy judges to "submit proposed findings of fact and conclusions of law to the district court," but by its terms that section only applies in proceedings that are "not * * * core." 28 U.S.C. 157(c)(1). And while Section 157(a) grants district courts discretion whether to refer bankruptcy cases or proceedings to the bankruptcy courts, it does not authorize the district court to alter the statutory framework that establishes the authority bankruptcy courts have over the cases referred to them. Thus, there is, following *Stern*, a statutory "gap" for core proceedings in which bankruptcy courts may not enter final judgment. In those cases, the bankruptcy courts likewise may not issue proposed findings of fact and conclusions of law. Because the "gap" is a *statutory* one, and only Congress can enact statutes, see *INS* v. *Chadha*, 462 U.S. 919, 956–958 (1983), only Congress can determine whether, and under what circumstances, to grant bankruptcy courts a lesser authority over core proceedings that they cannot finally adjudicate—or, alternatively, to resolve the constitu-

tional problem by other means, such as by elevating bankruptcy judges to status as Article III judges.

A. Section 157(b) Does Not Authorize Bankruptcy Judges To Propose Findings Of Fact And Conclusions Of Law In Core Proceedings

The court of appeals' conclusion that bankruptcy courts' authority to "hear and determine" a proceeding under Section 157(b)(1) "includes the more modest power to submit findings of fact and recommendations of law to the district courts," Pet. App. 24a, is inconsistent with the plain language of Section 157(b) and the statutory structure, and cannot be sustained.

1. The text and structure of Section 157(b) do not permit bankruptcy courts to propose findings of fact and conclusions of law in core proceedings

Statutory construction "begin[s] with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The court of appeals' construction of the phrase "hear and determine" as encompassing proposed findings of fact and conclusions of law cannot be squared with the text of the statute. To "determine" means to "decide or settle * * * conclusively and authoritatively." American Heritage Dictionary 494 (5th ed. 2011); accord Black's Law Dictionary 514 (9th ed. 2009) (a "determination" is a "final decision"); Black's Law Dictionary 405 (5th ed. 1979) (determination "implies ending or finality of a controversy or suit"). The word "determine" thus con-

notes finality—not the issuance of non-final recommendations.

Nor does proposing findings and conclusions fall within the bankruptcy court's authority in core proceedings to enter "appropriate orders and judgments, subject to review under section 158." 28 U.S.C. 157(b)(1). Section 158 provides for *appellate* review of "orders"—"final" orders and certain interlocutory orders. 28 U.S.C. 158(a). By definition, such appellate jurisdiction does not include consideration of proposed findings of fact and conclusions of law and entry of judgment by the district court in the first instance. See *Marbury*, 5 U.S. (1 Cranch) at 175 ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.").

The statutory structure confirms that Section 157(b) does not authorize bankruptcy courts to propose findings of fact and conclusions of law in core proceedings. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Proceedings that the bankruptcy courts are authorized to "hear and determine" are subject only to *appellate* review by an Article III court under Section 158. 28 U.S.C. 157(b)(1). Section 158, titled "appeals," provides district courts with "jurisdiction to hear appeals" from bankruptcy court final judgments, orders, and decrees, and from certain classes of interlocutory orders. See 28 U.S.C. 158(a). Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment as an initial matter in a core proceeding that has been referred to the bankruptcy court.

Section 157(c)(2) confirms the Bankruptcy Code's strict dichotomy between those proceedings in which the district court retains original jurisdiction and those in which it has appellate jurisdiction only.[7] Section 157(c)(2) authorizes bankruptcy courts to "hear and determine" certain non-core proceedings with consent of the parties. Like Section 157(b), Section 157(c)(2) specifies that the bankruptcy court may "enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title." 28 U.S.C. 157(c)(2).

The bankruptcy court's authority under Sections 157(b) and 157(c)(2) stands in stark contrast to its authority under Section 157(c)(1). That latter section, which is limited to non-core proceedings, see *Stern*, 131 S. Ct. 2604–2605, authorizes bankruptcy courts to "hear" the proceeding, but then it must "submit proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1). Section 157(c)(1) further specifies that "*any final order or judgment shall be entered by the district judge*" after reviewing "de novo" those parts of the bankruptcy court's proposal to

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[7] In *Stern*, the Court held that Section 157(b)(5)'s allocation between the bankruptcy court and district court of authority to oversee trial in a personal injury suit against the estate did not implicate questions of "jurisdiction." 131 S. Ct. at 2607–2608. To the extent the Court's language might be read to suggest more broadly that Sections 157 and 158 conferring authority to enter and review final judgments respectively on the bankruptcy and district courts, are categorically not "jurisdictional," that reading would be inconsistent with the text of Section 158(a), which is framed explicitly in the language of "jurisdiction." 28 U.S.C. 158(a) ("The district courts of the United States shall have jurisdiction to hear appeals * * * from final judgments * * * of bankruptcy judges.").

which the parties have objected. *Ibid.* (emphasis added). Section 157(b) grants no similar authority to district courts to conduct de novo review or enter final judgment in the first instance in core proceedings that have been referred to the bankruptcy court.

The structure of the statute thus confirms that Congress granted bankruptcy courts authority only to adjudicate core proceedings conclusively, not to issue non-final proposed findings of fact and conclusions of law in core proceedings.

2. Congress's use of "hear and determine" elsewhere confirms the plain meaning of Section 157(b)

Congress's use of the phrase "hear and determine" in other parts of the Bankruptcy Code and elsewhere confirms that Congress employs those words to require a final decision and preclude the possibility of a non-final proposal of findings and conclusions. See *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995) (a "term should be construed, if possible, to give it a consistent meaning throughout the Act"); *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its established meaning.").

This Court has recognized that Congress uses "hear and determine" when it wants to "get * * * dispute[s] settled" and convey "the idea of deciding a controversy." *N.L.R.B.* v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573, 579 (1961). That is equally true of the Bankruptcy Code. Most notably, Section 158 (enacted contemporaneously with Section 157) creates bankruptcy appellate panels to "hear and determine" appeals from bankruptcy courts. 28 U.S.C.

158(b)(1). It would be anomalous to say the least if a bankruptcy appellate panel authorized to "hear and determine" an appeal merely issued non-final, proposed findings and conclusions rather than a final judgment. The statute does not even contemplate non-final BAP recommendations because it provides no means for such hypothetical proposed findings and conclusions to be reviewed. 28 U.S.C. 158(d) (confining appellate jurisdiction of the courts of appeals to "final decisions, judgments, orders, and decrees" of the bankruptcy appellate panels). This makes clear that Congress intended "hear and determine" to allow only final adjudication and not some hypothetical, lesser-included power of non-final recommendations.

These sources confirm what the text and structure of the statute make plain: Section 157(b) cannot be read to authorize bankruptcy courts to propose findings and conclusions for de novo review by a district court in core proceedings.

B. Nor Does Section 157(c) Authorize Bankruptcy Judges To Propose Findings Of Fact And Conclusions Of Law In Core Proceedings

Although the court of appeals in the case below concluded that bankruptcy judges may propose findings of fact and conclusions of law in core proceedings pursuant to Section 157(b)(1), it is equally unavailing to try to locate such authority in Section 157(c)(1), as some lower courts have done and Respondent has urged. See, *e.g.*, *Field* v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421, 427–428 (D. Haw. 2011); Br. in Opp. 28. By its express terms, Section 157(c)(1) applies to "a proceeding that *is not a core proceeding* but that is otherwise

related to a case under title 11." 28 U.S.C. 157(c)(1) (emphasis added). Fraudulent conveyance claims are expressly denominated "core" by Section 157(b)(2)(H), and therefore do not fit within the framework established by Section 157(c)(1). See *Ortiz* v. *Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011).

Courts cannot treat a proceeding arising under title 11 or arising in a case under title 11 as though it were not a "core proceeding" merely because *Stern* held that Article III applies to the particular class of core proceedings. *Stern* recognized that the categories of core proceedings and "related to" proceedings in Section 157(b) and 157(c) are mutually exclusive. 131 S. Ct. at 2605. Indeed, the Court rejected the argument that a proceeding could be "simultaneously core and yet only related to the bankruptcy case" even though that construction of the statute would have avoided the serious constitutional question the Court ultimately decided. *Ibid.* ("We would have to rewrite the statute, not interpret it, to bypass the constitutional issue.") (brackets and internal quotation marks omitted). Thus, as the court of appeals below recognized, although the bankruptcy court lacked constitutional authority to decide the fraudulent conveyance claims against EBIA, those claims "remain in the core," Pet. App. 25a, and cannot be reassigned by the courts to Section 157(c)(1).

C. Nor May District Courts Utilize Section 157(a) To Confer On Bankruptcy Courts Authority To Propose Findings Of Fact And Conclusions Of Law In Core Proceedings

Section 157(a) grants district courts authority to refer "any or all cases under title 11 and any or all pro-

ceedings arising under title 11 or arising in or related to a case under title 11" to bankruptcy courts to be heard in accordance with Sections 157(b) and (c). See 28 U.S.C. 157(a). Every judicial district has exercised that authority by promulgating a standing order providing for the automatic reference of bankruptcy cases and proceedings. 1 Collier on Bankruptcy ¶ 3.02[1] (16th ed. 2009). Following *Stern*, a number of judicial districts have amended their orders of reference to provide that

> [i]f a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III * * * the bankruptcy judge shall * * * hear the proceeding and submit proposed findings of fact and conclusions of law to the district court.

In re Standing Order of Reference Re: Title 11, No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012); see also *In re Standing Order of Reference Re: Title 11*, (D. Del. Feb. 29, 2012); *In re Bankruptcy Proceedings*, Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). But as with other judicial efforts to remedy the gap created by the constitutional violation identified in *Stern*, these orders cannot be squared with the statute Congress enacted.

All local rules and standing orders must conform to federal statutes. See Fed. R. Civ. P. 83. Although Congress has granted district courts authority to determine *whether* to refer bankruptcy proceedings, once a case has been referred, the adjudicatory power of the bankruptcy court is defined with utmost precision by the statute. See 28 U.S.C. 157(b), (c). That authority does not include the power to issue proposed findings of

fact and conclusions of law in core proceedings. Cf. 28 U.S.C. 157(c)(1). Standing orders that purport to grant bankruptcy judges such power conflict with the detailed scheme Congress has enacted, and are thus invalid. See, *e.g.*, *Sigma Micro* v. *Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 784 (9th Cir. 2007) (holding local bankruptcy rule governing withdrawal of reference invalid because it conflicted with Section 157).

D. The Responsibility For Addressing The Constitutional Defects In Bankruptcy Administration Lies With Congress, Not The Judiciary

Filling the statutory gap created by *Stern*'s constitutional holding is the responsibility of Congress, not this Court. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996). For precisely that reason, after holding unconstitutional the Bankruptcy Act of 1978 in *Northern Pipeline*, this Court declined to speculate about how Congress would have revised the statute had it been aware of the constitutional defect. See 458 U.S. at 88 n.40. Instead it left it to "Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III." *Ibid.*

Congress determined in 1984 that bankruptcy courts should be authorized to enter final judgments in core proceedings. Had Congress been aware that bankruptcy courts lack constitutional authority to enter judgment in many core proceedings, it is far from clear that it would have preferred that in all such proceedings bankruptcy courts propose findings and conclusions to the district court for de novo review. The sponsors of the Bankruptcy Act of 1984 believed it

would "provide[] a single, prompt forum for almost all bankruptcy litigation" and repeatedly stressed that "bankruptcy judges would be able to enter final judgments in the 95 percent of cases that do not require involvement by an article III judge," leaving bankruptcy courts to propose findings of fact and conclusions of law in only "5 percent of bankruptcy cases." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). That no longer holds true after *Stern*. The sponsors of the 1984 Act also believed it would "eliminate most jurisdictional disputes" by "expressly identifying virtually all core proceedings." *Id.* at 6046. That too no longer holds true, as bankruptcy courts now have to determine both whether a proceeding is core *and* whether they are constitutionally authorized to enter final judgment. See *Stern*, 131 S. Ct. at 2630 (Breyer, J., dissenting) (lamenting that *Stern* will lead to a "constitutionally required game of jurisdictional ping-pong"). In fact, in some of the most recent major amendments to the bankruptcy administration scheme, Congress showed express concern for reducing the amount of multiple-layer review. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1233(a), 119 Stat. 23, 202–203 (2005) (introducing direct appellate review from bankruptcy courts to courts of appeals) (codified as amended at 28 U.S.C. 158(d)(2)); see H.R. Rep. 109-31, pt. 1, at 148–149 (2005) (noting time and cost factors attendant to the two-tier bankruptcy appellate system).

It is impossible to predict how Congress might eventually respond to *Stern*. Congress might decide to grant bankruptcy courts authority to propose findings of fact and conclusions of law in proceedings in which *Stern* requires that judgment be entered by the district

court. But, with a view toward avoiding "jurisdictional ping-pong," it might instead choose to recalibrate entirely the division of labor between bankruptcy judges and Article III courts. Congress might, even without changing the pay of bankruptcy judges or removing the first layer of district court review, choose to revisit Section 157(c) in light of *Stern* and preempt a number of potential constitutional challenges that loom in *Stern*'s wake. Congress could avoid all of the constitutional questions raised by *Northern Pipeline* and *Stern* by conferring Article III status on bankruptcy judges. See Hon. Joan N. Feeney, Statement to the House of Representatives Judiciary Committee on the Impact of *Stern v. Marshall*, 86 Am. Bankr. L.J. 357, 401 (2012) ("Article III status for bankruptcy judges is the only truly effective solution to the problems created by *Northern Pipeline*, the allocation of authority under the [1984 Act], and *Stern*."). In all events, the responsibility for deciding what structure of adjudication best advances the policy objectives of the federal system of bankruptcy administration lies with Congress, within constitutional constraints.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated.

Respectfully submitted,

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APPENDIX

APPENDIX A

28 U.S.C. 157

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires

consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

APPENDIX B

28 U.S.C. 158

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit

to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts

within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and

decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court,

or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

RESPONDENT'S BRIEF

No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. May a defendant in a federal fraudulent conveyance action consent to have the matter adjudicated by a bankruptcy judge?

2. If a defendant in a fraudulent conveyance action does not so consent to final bankruptcy judge adjudication, may the bankruptcy judge nonetheless hear the matter and issue a report and recommendation of proposed findings of fact and conclusions of law to the district judge adjudicating the matter for de novo consideration?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT 1

STATUTORY CONTEXT 9

A. The Historical Practice 9

B. The 1978 Experiment 13

C. The 1984 Amendments and the Return to Historical Practice 14

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. Consensual Resolution of Private-Rights Controversies by Adjudicators Working Under and at the Pleasure of Article III Judges Is Constitutional 21

A. The Court Has Long Approved the Historical Practice of Consensual Private-Rights Dispute Resolution by Adjudicators Working Within Article III 22

B. Modern Precedents Continue the Court's Approval of Consensual Adjudication Regimes in the Context of Magistrate Judges 25

C. *Stern* Itself Cements this Court's Approval of the Historical Practice of Consensual Adjudicatory Regimes 29

D. The Fatal Flaw in Unconstitutional Private-Rights Adjudicatory Regimes Has Always Been the Absence of Party Consent 31

E. *Schor*'s Reference to Unwaivable "Structural" Article III Rights Is Inapposite to this Case 35

1. *Schor*'s "Structural Test" for Separation of Powers Concerns Applies Only to Inter-Branch Encroachment 36

2. The Consensual Bankruptcy Court Adjudication Regime Within Article III Evinces No Impermissible Delegation of Judicial Authority 40

3. Consensual Adjudication Regimes Within Article III Otherwise Satisfy *Schor* 42

F. EBIA's Broad Arguments Undermine the Court's Careful Insistence That *Stern*'s Holding Was Narrow 45

II. Constitutionally Permissible Consent May Be Implied 51

III. Implied Consent on the Facts of this Case Was Properly Found by the Courts Below, But The Court Need Not And Should Not Decide that Question 54

A. The Court Need Not and Should Not Decide Whether and When, on the Facts of this Case, EBIA Consented 54

B. EBIA Unequivocally Consented to Bankruptcy Court Adjudication of the Summary Judgment Motion 60

IV. *Stern* Creates No Insoluble "Gap" in Section 157 63

CONCLUSION 70

TABLE OF AUTHORITIES

CASES

Page(s)

A.L.A. Schecter Poultry Corp. v. United States,
295 U.S. 495 (1935) 40

Bell & Beckwith v. United States,
766 F.2d 910 (6th Cir. 1985) 28

Carpenters Pension Trust Fund for N. Cal. v. Moxley,
2013 WL 4417594 (9th Cir. Aug. 20, 2013) 49

Cent. Va. Cmty. Coll. v. Katz,
546 U.S. 356 (2006) 10, 51

Collins v. Foreman,
729 F.2d 108 (2d Cir. 1984) 28

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986) ..... *passim*

CoreStates Bank, N.A. v. Huls Am., Inc.,
176 F.3d 187 (3d Cir. 1999) 49

Crowell v. Benson,
285 U.S. 22 (1932) 35

D.L. Auld Co. v. Groma Graphics Co.,
753 F.2d 1029 (Fed. Cir. 1985) 28

Dang v. Bank of Am. N.A.,
2013 U.S. Dist. LEXIS 54833 (D. Md. Apr. 17, 2013) 64

Estate of Conners v. O'Conner,
6 F.3d 656 (9th Cir. 1993) 55

Exec. Benefits Ins. Agency v. Arkison,
133 S. Ct. 2880 (June 24, 2013) 58

Fields v. Washington Metro. Area Transit Auth.,
743 F.2d 890 (D.C. Cir. 1984) 28

Frazin v. Haynes & Boone (In re Frazin),
732 F.3d 313, 2013 WL 5495920 (5th Cir. 2013) 46

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 68

Gairola v. Virginia Dep't of Gen. Servs.,
753 F.2d 1281 (4th Cir. 1985) 28

Geras v. Lafayette Display Fixtures, Inc.,
742 F.2d 1037 (7th Cir. 1984) 28

Goldstein v. Kelleher,
728 F.2d 32 (1st Cir. 1984) 28

Gomez v. United States,
490 U.S. 858 (1989) 18, 33

Gonzalez v. United States,
553 U.S. 242 (2008) 39, 40, 51

Granfinanciera S.A. v. Nordberg,
492 U.S. 33 (1989) ..... *passim*

Hasse v. Rainsden (In re Pringle),
495 B.R. 447 (B.A.P. 9th Cir. 2013) 58

Heckers v. Fowler,
69 U.S. (2 Wall.) 123 (1864) 24, 42

Hess v. Exec. Benefits Ins. Agency,
No. 06-2-01256-5 (Wa. Sup. Ct. June 14,
2006) 1

In re Ambac Fin. Grp.,
457 B.R. 299 (S.D.N.Y. 2011) 46

In re Bokum Res. Corp.,
49 B.R. 854 (Bankr. D.N.M. 1985) 32

In re Johnson,
960 F.2d 396 (4th Cir. 1992) 62

In re Patterson,
18 F. Cas. 1313 (S.D.N.Y. 1867) 12

Katchen v. Landy,
382 U.S. 323 (1966) 12, 32

Kimberly v. Arms,
129 U.S. 512 (1889) 23

Kirschner v. Agoglia,
476 B.R. 75 (S.D.N.Y. 2012) 49

Langenkamp v. Culp,
498 U.S. 42 (1990) 32, 33, 34

Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.,
739 F.2d 1313 (8th Cir. 1984) 28

MacDonald v. Plymouth Cnty. Trust Co.,
286 U.S. 263 (1932) 12, 31

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 38

Murray's Lessee v. Hoboken Land & Improvement Co.,
59 U.S. (18 How.) 272 (1855) 34

Mitchell v. Mitchell, 59 F.2d 62 (1st Cir. 1932) 25

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 69

Nguyen v. United States,
539 U.S. 69 (2003) 27

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) ..... *passim*

Ortiz v. Aurora Health Care, Inc. (In re Ortiz),
665 F.3d 906 (7th Cir. 2011) 64, 68

Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.,
725 F.2d 537 (9th Cir. 1984) 28, 40, 42

Peretz v. United States,
501 U.S. 923 (1991) ..... *passim*

Peterson v. Somers Dublin Ltd.,
729 F. 3d 741 (7th Cir. 2013) 29, 52

Plaut v. Spendthrift Farm., Inc.,
514 U.S. 211 (1995) 27

Puryear v. Ede's Ltd.,
731 F.2d 1153 (5th Cir. 1984) 28

Roell v. Withrow,
538 U.S. 580 (2003) ..... *passim*

Rothroch v. PNC Bank, N.A. (In re Parco Merged Media Corp.),
489 B.R. 323 (D. Me. 2013) 65

Sheridan v. Michels (In re Sheridan),
362 F.3d 96 (1st Cir. 2004) 52, 58

Sinclair v. Wainwright,
814 F.2d 1516 (11th Cir. 1987) 28

Stern v. Marshall,
131 S. Ct. 2594 (2011) ..... *passim*

Thomas v. Union Carbide Agr. Prods. Co.,
473 U.S. 568 (1985) 31, 32, 35, 45

United States ex rel Toth v. Quarles,
350 U.S. 11 (1955) 38

United States v. Dobey,
751 F.2d 1140 (10th Cir. 1985) 28

Weidhorn v. Levy,
253 U.S. 268 (1920) 13

Wellness Int'l Network v. Sharif,
727 F.3d 751 (7th Cir. 2013) 29, 68

Wharton-Thomas v. United States,
721 F.2d 922 (3rd Cir. 1983) 28

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 41

CONSTITUTION AND FEDERAL STATUTES

U.S. CONST. ART. III ..... *passim*

11 U.S.C. § 101(13) 56

11 U.S.C. § 362 2

11 U.S.C. § 548 3

18 U.S.C. § 3401(a) 53

28 U.S.C. § 151 14

28 U.S.C. § 157(a) 14, 65, 66

28 U.S.C. § 157(b) 15, 59, 67

28 U.S.C. § 157(b)(1) 21, 66

28 U.S.C. § 157(b)(2)(H) 16, 62, 63

28 U.S.C. § 157(c)(1) ..... *passim*

28 U.S.C. § 157(c)(2) 15, 51, 65

28 U.S.C. § 157(d) 5, 14, 21, 67

28 U.S.C. § 157(e) 51

28 U.S.C. § 158 66

28 U.S.C. § 636(c)(1) 25, 26, 53

28 U.S.C. § 1334(b) 53

Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803) 9

Act of March 2, 1867, ch. 176, 14 Stat. 517, (repealed 1878) 11

Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978) 11

Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) 13

RULES

Fed. R. Bankr. P. 7001(1), 7004 2

Fed. R. Bankr. P. 7008 58

Fed. R. Bankr. P. 7012 ..... 51, 58

Fed. R. Bankr. P. 7012(b) 4

Fed. R. Civ. P. 55(b)(1) 42

OTHER AUTHORITIES

1 COLLIER ON BANKRUPTCY ¶ 3.03[4] (16th ed. 2011) 59

130 Cong. Rec. E. 1109-10 (daily ed. Mar. 20, 1984) 15

130 Cong. Rec. H. 7492 (daily ed. June 29, 1984) 69

130 Cong. Rec. 6045 (1984)..... 52

2 WILLIAM BLACKSTONE, COMMENTARIES..... 50

Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991)..... 10

Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) .. 9, 11, 50

Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990)..... 34

David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983) 48

Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25 (1982) 48

James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) 50

John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15 (1991)..... 12

Order Regarding Referral of Title 11 Proceedings to the United States Bankruptcy Judges for This District (Jan. 23, 1997, *reprinted in* Bankruptcy Court Decisions News and Comment, Feb. 4, 1997) 41

Ralph Brubaker, *A 'Summary' Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121 (2012)..... 11, 64

Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).... 34

S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967 49

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STATEMENT

This matter arises out of the bankruptcy proceedings of Bellingham Insurance Agency, Inc. ("Bellingham"). Bellingham's affairs were orchestrated largely by Nicholas Paleveda ("Paleveda"), an attorney. Pet. App. 5a. Bellingham had a corporate affiliate named Aegis Retirement Income Services, Inc. ("ARIS"), with which Bellingham kept joint accounting records. *Id.*

In 2003, Paleveda and his then-partners had a falling-out about the distribution of insurance commissions, and the partners instructed the remitting carrier to deposit future commissions into a separate account not accessible by Paleveda. Resp. to Trustee's Mot. Partial Summ. J. 2–3, ECF No. 24. Paleveda responded by initiating arbitration. *Id.* He lost, and the arbitrator ordered him and Bellingham to pay the ex-partners' attorneys' fees. First Am. Compl. ¶ 7, *Hess v. Exec. Benefits Ins. Agency*, No. 06-2-01256-5 (Wa. Sup. Ct. June 14, 2006).

After the arbitrator rendered this adverse determination as an interim award, but before it was finalized, Paleveda initiated a wholesale transfer of assets from Bellingham to a newly created company named Executive Benefits Insurance Agency ("EBIA"), petitioner in this appeal. Pet. App. 43a–44a. The transfer was affected in part by Bellingham assigning its

commissions to EBIA directly, and in part through transfers via third parties. *Id.* at 35a. The transfer of property was all done on paper—EBIA occupied Bellingham's corporate headquarters, employed Bellingham's staff, and engaged in Bellingham's business. *Id.* at 50a. Although Paleveda repeatedly insisted that these were distinct companies, the courts below dismissed this as the "narcissism of minor differences" and found full alter-ego liability. *See id.* at 38a–39a.

Upon discovering the looting of Bellingham's assets, the ex-partners commenced a state-court fraudulent conveyance action against Bellingham, Paleveda, and ARIS, among others. *Id.* at 44a. Paleveda halted that lawsuit by placing Bellingham in Chapter 7 bankruptcy, thus invoking the automatic stay. *Id.*; 11 U.S.C. § 362. He then removed the fraudulent conveyance action to the federal bankruptcy court presiding over Bellingham's Chapter 7 case, and filed his answer in the duly opened adversary proceeding. J.A. 1–2. (Bankruptcy procedure requires that a matter such as a fraudulent conveyance action be docketed as a separate "adversary proceeding" within a bankruptcy case, with independent service of process. Fed. R. Bankr. P. 7001(1), 7004.)

Paleveda's respite from the fraudulent conveyance litigation proved short-lived. His Chapter 7 petition created an independent

bankruptcy estate. Respondent, Peter Arkison, was appointed trustee, thus divesting Paleveda of further control over Bellingham. Arkison commenced his own fraudulent conveyance action (on behalf of all of Bellingham's unsecured creditors, not just the arbitration victors), under section 548 of the Bankruptcy Code, 11 U.S.C. § 548, against, among others, Paleveda; EBIA, the recipient of the transferred assets; and ARIS, which participated in the chain of transactions that put Bellingham's money in EBIA's hands. Pet. App. 6a. A new adversary proceeding docket was opened, giving rise to the instant action. J.A. 8.

The relevant defendant for present purposes is EBIA, the entity Paleveda created three days before the final arbitration award. Pet. App. 43a.[1] EBIA filed an answer in the adversary proceeding, denying many of the allegations. J.A. 79. Critically for purposes of this appeal, EBIA denied that the fraudulent conveyance action was a "core" proceeding, *id.* at 80, which means that EBIA took the position that the proceeding was "non-core" and thus EBIA was entitled to all the Article III and Seventh Amendment rights non-core proceedings entail.

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[1] While EBIA and Paleveda are nominally distinct, the overlap between the fraudulent conveyance defendants is difficult to overstate. For example, Paleveda represented EBIA as counsel below in the proceedings before the Court of Appeals. Pet. App. 3a.

See Stern v. Marshall, 131 S. Ct. 2594, 2604–05 (2011) (explaining that core and non-core matters are exhaustive categories of bankruptcy proceedings). Consistent with its position that the fraudulent conveyance proceeding was non-core, EBIA also demanded (albeit belatedly and in the wrong case) a jury trial. J.A. 94; Pet. App. 79a.

Under Bankruptcy Rule 7012, when a defendant denies in its answer that a proceeding is core, as EBIA did, it is required to state in that same answer whether it consents to the bankruptcy court's entry of a final judgment, or whether it prefers instead to exercise its right to insist that the bankruptcy judge merely issue proposed findings of fact and conclusions of law subject to de novo review in the district court. Fed. R. Bankr. P. 7012(b). (This up-front declaration prevents sandbagging by making it impossible for a party who chooses to proceed before a bankruptcy judge to claim in regret after a loss that it never consented to bankruptcy court resolution.)[2] EBIA violated Rule 7012.

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[2] "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties." Fed. R. Bankr. P. 7012(b).

Although it denied that the fraudulent conveyance proceeding was core, it refused to state whether it consented or not to a final adjudication in the bankruptcy court.

After discovery, Arkison moved for summary judgment against ARIS. J.A. 12. Citing disputed facts, the bankruptcy judge denied the motion. *Id.* at 17–18. After ARIS successfully survived summary judgment, EBIA brought a motion in the bankruptcy court to vacate the existing bankruptcy court trial date, citing its jury demand that would require trial in the district court. *Id.* at 95; Pet. App. 77a. Arkison objected, asserting, among other reasons, the untimeliness of the jury trial demand. J.A. 97. Instead of holding a hearing on the contested motion, however, the bankruptcy court vacated the trial date and transmitted the record to the district court, which docketed the matter as a motion to withdraw the reference of the adversary proceeding from the bankruptcy court. *Id.* at 101, 104. (A motion to withdraw the reference is the means by which a district court exercises its supervisory prerogative to take a bankruptcy case or proceeding away from a bankruptcy judge, either in whole or in part. 28 U.S.C. § 157(d).)

In preparing to address whether to withdraw the fraudulent conveyance proceeding from the bankruptcy court, the district judge (Jones, J.) ordered a status conference and instructed the

parties to participate in preparing a Joint Status Report (the "JSR") to help inform the court's decision. J.A. 104. Counsel for all the parties—with the exception of Paleveda, representing himself—joined a conference call to discuss the JSR. *See* Pet. App. 73a. After the call, Arkison's counsel circulated the agreed-upon report, but EBIA's counsel never signed it before transmission to Judge Jones. *Id.* EBIA made no objection when the report was circulated and voiced none after it was filed. The JSR advised Judge Jones that settlement discussions, further discovery, and motions for summary judgment were being contemplated in the bankruptcy court. *Id.* The JSR therefore requested that he defer adjudicating the withdrawal motion pending the resolution of those matters. *Id.* Thus, the JSR left no doubt that summary judgment motions were anticipated and would be litigated in the bankruptcy court when filed. *Id.* Faced with apparently unanimous consent and certainly no declared opposition, Judge Jones re-calendared the withdrawal motion for three months hence. J.A. 33.

As anticipated, Arkison filed a motion for summary judgment against EBIA in the bankruptcy court. *Id.* at 106. At the hearing on the motion, the court found that there were no genuine issues of material fact regarding whether EBIA was the alter-ego of Bellingham or whether assets had been transferred into EBIA (either directly or via various conduits),

and thus Arkison was entitled to judgment as a matter of law. *Id.* at 181–85. The bankruptcy judge therefore entered summary judgment against EBIA. *Id.* At no point in the summary judgment pleadings or at the hearing—including after circulation of the judgment—did EBIA ever suggest that the bankruptcy judge could not finally decide the matter but could only enter proposed findings of fact and conclusions of law in a matter that EBIA contended was non-core.

Instead, EBIA appealed the bankruptcy court's judgment. Conducting a full de novo review, the district court (Pechman, C.J.) affirmed the bankruptcy court's grant of summary judgment, setting forth her reasons and analysis in an extensive and detailed opinion. Pet. App. 41a.

While EBIA was prosecuting its appeal in the district court before Chief Judge Pechman, Judge Jones, who still had jurisdiction over the withdrawal motion, remained in the dark. He issued an order to show cause when nobody updated him on the status of the motion, asking why the parties had not followed up with an appropriate report. J.A. 33–34. Arkison's counsel responded, bringing Judge Jones up to speed and explaining her belief that EBIA had presumably lost interest in pursuing the motion. *Id.* at 34. Hearing nothing from EBIA, Judge Jones dismissed the motion to withdraw the reference as abandoned. *Id.*

EBIA appealed the district court's affirmance of the bankruptcy court's summary judgment determination to the Ninth Circuit, with Paleveda representing EBIA directly. *Id.* at 39. After EBIA's brief was filed, but before oral argument, EBIA for the first time raised an objection that Article III of the United States Constitution precluded the bankruptcy court's entry of judgment (including summary judgment) against it on the fraudulent conveyance claim. *Id.* at 41. After the panel invited amicus participation on the scope of this Court's holding in *Stern*, 131 S. Ct. 2594, to which over a dozen amici, including the United States, responded, Pet. App. 58a, the Ninth Circuit affirmed. *Id.* at 1a.

While opining in dictum that a fraudulent conveyance action cannot be tried to final judgment in a bankruptcy court over the timely objection of a non-creditor defendant without violating Article III, *see Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989); *Stern*, 131 S. Ct. 2594, the Court of Appeals held that EBIA's consent obviated any Article III problem. Pet. App. 58a. Although EBIA's consent had not been given explicitly in writing, the court held that EBIA's acquiescence could be implied by its unambiguous conduct. *Id.* at 30a. In other words, the court held, EBIA knowingly took its summary judgment chances in the bankruptcy court and could not later plead lack of consent to get a second bite at the apple.

Although EBIA's consent rendered entry of judgment by the bankruptcy court appropriate, the Court of Appeals (to provide guidance to future cases) also decided that in non-creditor fraudulent conveyance cases where the defendant does *not* consent to bankruptcy court adjudication, bankruptcy judges may nonetheless enter proposed findings of fact and conclusions of law for district court de novo consideration (the procedural treatment accorded non-core proceedings). *Id.* at 24a–25a. This appeal followed.

STATUTORY CONTEXT

A. The Historical Practice

In 1800, Congress passed its first bankruptcy act. Bankruptcy Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). The 1800 act entrusted administration of the debtor's estate to judicial officers called "commissioners," who were appointed by district courts. Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 608–09 (1998). Congress largely copied the English bankruptcy statute then in force. *See* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–7 (1995) [hereinafter Tabb, *History of the Bankruptcy Laws*]. English bankruptcy commissioners had great power over the affairs of bankrupts; for instance, they could "[s]ell and

a[ss]ign all property which a bankrupt has conveyed in contemplation of an act of bankruptcy," i.e., a fraudulent conveyance. A SUCCINCT DIGEST OF THE LAWS RELATING TO BANKRUPTS 83 (Dublin, Brett Smith 1791).

American commissioners under the Act of 1800 had similarly broad authority. Plank, *supra*, 607–09; *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370–71 (2006). Commissioners, among other matters, adjudicated whether a debtor was bankrupt and processed debtor claims. *See* Plank, *supra*, at 608. Furthermore, the act entrusted these adjudicators with the power to decide nearly all bankruptcy disputes. *Id.* at 609. The authority of these commissioners included warrant and subpoena power, contempt authority to jail uncooperative witnesses, and even the power to imprison third parties withholding debtor assets. *Id.* at 608–09. Commissioners generally decided bankruptcy matters, which parties could then appeal to district courts. *Id.* at 609. For example, a district judge could grant a discharge if it found that discharge had been "unreasonably denied" by the commissioner. Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 346–47 (1991).

Throughout the nineteenth century, Congress experimented with variations in bankruptcy law, including the selection of bankruptcy

commissioners. In 1841, Congress allowed district judges to use their general supervisory powers to appoint commissioners adjudicating bankruptcy cases in their districts. *See* Ralph Brubaker, *A 'Summary' Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 126–27 n.25. (2012). In 1867, the district courts, sitting as "courts of bankruptcy," were directed to appoint "registers in bankruptcy," rather than commissioners. Bankruptcy Act of March 2, 1867, ch. 176, 14 Stat. 517, §§ 1, 3 (*repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878)); Tabb, *History of the Bankruptcy Laws*, *supra*, at 19. Registers, as officers of the district court, were nominated by the Chief Justice of the United States and then appointed and removed by district judges. Act of 1867, §§ 3, 5.

Congress passed its first permanent bankruptcy act in 1898, changing the name of the relevant bankruptcy officer to "referee." Brubaker, *supra*, at 127. (The district courts were given the option to "refer" bankruptcy cases to these adjudicators to resolve. Bankruptcy Act of July 1, 1898, ch. 541, § 22, 30 Stat. 544 (repealed 1978).) Under the 1898 claims-resolution scheme, just as in pre-constitutional England with commissioners, most proceedings before referees were "summary" in nature, with abbreviated procedures befitting the need to adjust and finalize claims to a debtor's assets

expeditiously. *See* Brubaker, *supra*, at 127–28. Certain bankruptcy-related matters, however, required full legal process. *Id.* at 128–29. These were known as "plenary" matters, and trustees in bankruptcy (sometimes referred to historically as "assignees") would have to resort to state or federal courts to pursue them. *Id.* For example, a breach of contract claim vested in the estate as a chose in action would be pursued by the assignee as a plenary suit.

The principal rule for dividing summary from plenary matters was that the referees generally had summary jurisdiction over property within the actual or constructive possession of the debtor. *See Katchen v. Landy*, 382 U.S. 323, 327 (1966) (quoting *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940)); John C. McCoid, II, *Right to Jury Trial in Bankruptcy: Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 36 (1991). Other assets could only be reached by plenary proceedings. *Katchen*, 382 U.S. at 36. Parties could, however, jointly consent to proceed before a referee in a summary proceeding, even with respect to an otherwise plenary matter. *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932) ("[W]e can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted."); *see also In re Patterson*, 18 F. Cas.

1313, 1314 (S.D.N.Y. 1867) (holding, under the 1867 bankruptcy act, that parties can impliedly consent to adjudication by a register). In contrast, the *absence* of consent precluded the resolution through summary proceedings of a plenary matter. *Weidhorn v. Levy*, 253 U.S. 268, 274 (1920).

B. The 1978 Experiment

In 1978, Congress radically overhauled the bankruptcy court system in two main ways. *See* Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). First, the summary/plenary division was abolished; bankruptcy judges (as referees had come to be called) were given jurisdiction over *all* matters falling under the federal subject matter jurisdiction in bankruptcy, i.e., all matters arising in a bankruptcy case, under the Bankruptcy Code, or related to the bankruptcy case. *See id.* at § 1471. Second, bankruptcy courts were largely freed from the oversight of the district courts, who were stripped of the power to refer matters to bankruptcy judges. Instead, Congress provided for *mandatory* assignment of all bankruptcy cases to the new bankruptcy courts for full and final judgment on all questions of law and fact. *See id.* at § 1471(c). These new autonomous courts were styled "adjuncts" of the district court. *See id.* at § 151. These newly powerful bankruptcy judges, however, did not have life

tenure or salary protection. *See id.* at §§ 152–154.

C. The 1984 Amendments and the Return to Historical Practice

After this Court struck down this unprecedented new bankruptcy court system in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress reverted to the historical reference-based model, abandoning the idea of independent bankruptcy courts. Specifically, Article III district judges were again given the power to use or ignore bankruptcy judges as inclined, referring bankruptcy cases to them at the district judges' election and without compulsion by Congress. 28 U.S.C. § 157(a). Additionally, the district judges were once more granted the power to take cases back from bankruptcy judges "mid-stream," for cause. 28 U.S.C. § 157(d). Bankruptcy judges were classified statutorily as "units" of the district court. 28 U.S.C. § 151.

Further, tracking the language in Justice Brennan's plurality opinion and Justice Rehnquist's concurrence regarding the restructuring of debtor-creditor relations as lying at the "core" of the federal bankruptcy power, *see Northern Pipeline*, 458 U.S. at 71 (plurality opinion); *id* at 90 (Rehnquist, J., concurring), Congress curtailed bankruptcy judges' ability to enter final judgments. Under the 1984

amendments, bankruptcy judges could enter final judgments only with respect to such "core matters." 28 U.S.C. § 157(b). In all other matters, such as state common law actions—members of Congress called these "*Marathon* claims"—the authority of bankruptcy judges tracked the magistrate judge system: bankruptcy judges could only enter proposed findings of fact and conclusions of law, unless the parties jointly consented to allowing a final judgment. 28 U.S.C. § 157(c)(1)–(2). In this regard, Congress *explicitly* mirrored the magistrate system. 130 Cong. Rec. E 1109–10 (daily ed. Mar. 20, 1984) (statement by Rep. Kastenmeier) (explaining that "[t]he powers that bankruptcy judges exercise" will be "identical to those exercised by magistrates," including the power to "enter a binding judgment" as long as "the parties consent"). Congress's clear intent was to follow the Constitution's commands:

> Where the parties consent, the bankruptcy judge may enter a binding judgment. Identical consent provisions have been upheld by each of the four courts of appeals to address the issue . . . .
>
> . . . .
>
> Question: May the parties consent to have State law suits decided by a bankruptcy judge?

> Answer: Yes. If this were not true, then the U.S. magistrate judge system, which is partly based upon consent, would also be unconstitutional . . . .

Id.

Congress thus returned to the basic bifurcated approach that existed before 1978, albeit replacing the summary/plenary distinction with the Court-inspired terminology "core/non-core." The only real difference between the pre-1978 and post-1984 regimes in this regard is that the core/non-core dichotomy does not exactly track the summary/plenary distinction. For example, the statutory definition of core proceedings includes federal fraudulent conveyance actions. 28 U.S.C. 157(b)(2)(H). Thus, in some respects, Congress made core proceedings broader than the former category of summary proceedings. The general mechanism for consensual adjudication, however, did not change. Just as plenary matters could be treated as summary with party consent pre-1978, so too non-core matters could be treated as core with consent post-1984. Following the magistrate judge model, Congress authorized bankruptcy judges to issue final judgments in such consensual proceedings.

SUMMARY OF ARGUMENT

As this Court explained in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986), "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." In that case, Schor waived his right to an Article III adjudication, preferring instead the faster procedure before the Commodities Futures Trading Commission ("CFTC"). So too in this case, EBIA chose to take its summary judgment chances in the bankruptcy court on its fraudulent conveyance claim instead of exercising its right to proceed in district court. Only after EBIA lost did it raise an Article III challenge on appeal. As in *Schor*, EBIA's waiver of its personal right did not offend Article III. And while *Schor* adds that in some, but not all, cases, Article III presents "structural" concerns that the parties cannot waive, those concerns do not arise in this case. EBIA's waiver was thus fatal.

Article III is not offended by EBIA's waiver in this case any more than it was in *Schor*—in fact, less so. Unlike *Schor*'s administrative regime, the bankruptcy court consensual adjudication system exists entirely within Article III, following longstanding judicial practice. Centuries of tradition have allowed the consensual resolution of private rights by adjudicators, such as the bankruptcy

commissioners, who lack the protections of Article III but serve at the pleasure and under the control of the district courts. And since the nation's early days, this Court has repeatedly upheld the use of special masters in equity who functioned similarly to today's bankruptcy judges.

The modern analogues to special masters—magistrate judges—continue the longstanding tradition of consensual private-rights adjudication within Article III. Magistrate judges were the model upon which consensual bankruptcy court adjudication was explicitly based and their authority has been upheld against Article III challenge by every Circuit Court of Appeals. Indeed, in *Roell v. Withrow*, 538 U.S. 580 (2003), this Court found consensual magistrate adjudication so constitutionally unremarkable it divided only on whether that consent could be implied in the absence of a writing.

The only time this Court has struck down a regime as a violation of Article III has been when the parties have not consented to judgment of their private rights by a non-Article III adjudicator. Indeed, consent is so critical that it is the sole distinguishing feature between the regime found constitutional by this Court in *Peretz v. United States*, 501 U.S. 923 (1991) and unconstitutional in *Gomez v. United States*, 490 U.S. 858 (1989). And in *Stern* itself, the lack of

true consent to bankruptcy court adjudication by the petitioner was the lynchpin in the Court's holding of constitutional infirmity.

This Court's reference in *Schor* to the unwaivable, "structural" component of Article III that pertains to the separation of powers is inapplicable in this case and presents no problem to consensual adjudicatory regimes like bankruptcy courts. *Schor* explicitly holds that these unwaivable concerns are only implicated in some private-rights cases. Specifically, concern arises only in connection with inter-branch incursion: when the executive or legislative branches threaten or encroach upon the power of the judiciary. Because resort to bankruptcy judges is fully at the joint election of district judges and the parties in private-rights controversies, the political branches have no involvement whatsoever and hence there is no encroachment on the judiciary violating the separation of powers.

To the extent that wholly *intra-branch* regimes can even raise structural constitutional concerns, those concerns would sound in the non-delegation doctrine. Here, there is no serious argument that adjudication by a bankruptcy judge *at the request of the parties* reflects an impermissible abdication of the judicial function any more than confirmation of an arbitration award determined by private arbitrators on party consent or even a clerk of court's entry of a

default judgment under the Federal Rules of Civil Procedure.

EBIA's broad-sweeping arguments that suggest invalidating the entire bankruptcy and magistrate judge systems reflect a profound misreading of *Stern*. The Court should dispel this uncertainty and confirm that *Stern* is precisely the narrow decision it purports to be. To the extent that EBIA challenges the constitutionality of core bankruptcy court power to adjust debtor-creditor claims, the Court should decline to reach this unnecessary question or, in the alternative, uphold these historically exercised powers as constitutional.

Consent to bankruptcy judge adjudication may be implied by conduct of the kind at issue here, just as the Court held that consent could be implied in the analogous if not identical magistrate judge setting in *Roell*. Although EBIA's consent was properly implied in this case, the Court need not decide this factual question on which it did not grant certiorari. Because an Article III district court conducted a full de novo review of the summary judgment order and entered its own judgment, EBIA got all the Article III consideration to which it was entitled. Remand could produce no different outcome. This is as it should be, because EBIA's insistence that its claim was non-core—in the face of a statute that lists fraudulent conveyances as core—shows that EBIA knew it had a right to

insist on Article III adjudication, a stance that accurately anticipated this Court's decision in *Stern*. Knowing (or at least, correctly predicting) that it had the right to veto proceedings in bankruptcy court, but then flouting the rule requiring it to specify whether it consented to those proceedings, consigns EBIA to the consequences of its choice of forum. EBIA's failure to follow the basic pleading rules specifically designed to prevent this sort of maneuver cannot be used as a sandbag.

Stern creates no insoluble statutory gap. Bankruptcy judges may issue proposed findings of fact and conclusions of law on "*Stern* claims" if the parties do not consent to final judgment in bankruptcy court. EBIA's contrary argument misreads the permissive power to enter an order or judgment under 28 U.S.C. § 157(b)(1) as mandatory, reads the reference-withdrawal power of section 157(d) out of the statute, and is otherwise unsound.

ARGUMENT

I. Consensual Resolution of Private-Rights Controversies by Adjudicators Working Under and at the Pleasure of Article III Judges Is Constitutional.

As the Court has explained, "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters

within the judicial power of the United States . . . serves to protect *primarily* personal, rather than structural, interests." *Schor*, 478 U.S. at 848 (emphasis added). This is so because private rights, as their name implies, are entitlements held by private individuals, whose dignity and autonomy in choosing how they wish to resolve their disputes should be respected. For this reason, the presence or absence of consent has been the touchstone of this Court's jurisprudence on the constraints of Article III. And while consent cannot be dispositive in regimes that evince encroachment by the political branches into the independence and integrity of the judiciary—a structural violation of separation of powers—it can be fully vindicated in adjudicatory regimes implemented entirely within the judicial branch.

A. The Court Has Long Approved the Historical Practice of Consensual Private-Rights Dispute Resolution by Adjudicators Working Within Article III.

Under the earliest American bankruptcy statutes, judicial officers lacking the protections of Article III life tenure and guaranteed salary have played an important role in adjudicating claims that, without the parties' consent, would traditionally be decided in federal court by Article III judges. For example, following ancient chancery court practice, federal courts

sitting in equity routinely permitted special masters to resolve a variety of disputes over matters of private right. *E.g.*, *Kimberly v. Arms*, 129 U.S. 512, 524 (1889).

Sometimes the master would serve a only recommending role, with final judgment reserved to an Article III judge, but at other times, the master was given full adjudicatory authority. As the Court explained in *Kimberly*, the touchstone of this power derived from the autonomy of the parties:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him, without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set

> aside and disregarded at the mere discretion of the court. A reference, by consent of the parties, of an entire case for the determination of all its issues, though not strictly a submission . . . to arbitration . . . , is a submission of the controversy to a tribunal of the parties' own selection.

Id. at 524 (citing English authorities and finding the power to refer such cases upon party request "incident to all courts of superior jurisdiction").

Similarly, in *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123 (1864), the Court upheld the parties' joint consent to a referee. EBIA cites *Heckers* for the proposition that referees could *not* exercise judicial power, because the final judgment was entered by the district court and not by the referee. Pet'r's Br. at 31. But this misunderstands *Heckers*. There, the parties "agreed that the report of the referee should have the same force and effect as a judgment of the court . . . ." *Heckers*, 69 U.S. at 133. The circuit court ordered, "by consent of parties, that on filing the [referee's] report with the clerk of the court, judgment should be entered in conformity therewith, the same as if the cause had been tried before the court." *Id.* The referee made and filed the report, and the clerk entered judgment. *Id.* This Court affirmed. *Id.* at 133–34. In fact, bankruptcy commissioners and referees historically issued their decrees directly in resolving their cases. *See, e.g.*, McCoid, *supra*,

at 30 n.80 (English bankruptcy commissioners) (citing *Clark v. Capron*, 30 Eng. Rep. 832 (1795)); *Mitchell v. Mitchell*, 59 F.2d 62, 66 (1st Cir. 1932), ("The decree of the District Court is reversed, and the order or decree of the referee is affirmed . . . ").

Critically, these practices did not "create" jurisdiction "by consent" where it did not otherwise exist. In all instances, the referring courts possessed subject matter jurisdiction over the relevant controversy and likewise possessed the necessary reference authority (either as a matter of tradition, statute, or rule). These practices demonstrate that, with the consent of the parties, courts *with* jurisdiction could legitimately exercise their reference authority to refer matters to be heard and finally determined by inferior adjudicators.

B. Modern Precedents Continue the Court's Approval of Consensual Adjudication Regimes in the Context of Magistrate Judges.

Modern cases continue this tradition of approving consensual resolution of private-rights disputes within Article III-controlled regimes. In 2003, the Court decided *Roell*, which involved implied consent to final judgments by federal magistrate judges under 28 U.S.C. § 636(c)(1). 538 U.S. at 585–86. Section 636(c)(1)'s grant of authority to magistrate judges is even broader

than section 157(c)(2)'s grant of authority to bankruptcy judges to enter judgment in non-core proceedings "related to" bankruptcy upon party consent: section 636(c)(1) allows consensual magistrate final judgments in all civil proceedings and even misdemeanor criminal trials. *Compare* 28 U.S.C. § 636(c)(1) *with* 28 U.S.C. § 157(c)(1). Rejecting the argument that express consent was a precondition to such consensual adjudicative power, the Court affirmed that implied consent of the parties sufficed. *Roell*, 538 U.S. at 582, 586–87 (holding that the statute's textual reference to mere "consent" trumped Federal Rule of Civil Procedure 73(b)'s reference to an express execution and filing of "a joint form of consent").

Although the dissent disapproved of implied consent, preferring for prudential reasons the bright-line rule of express consent to escape what it feared would be a litigation-inducing standard, *id.* at 596 (Thomas, J., dissenting), the dissent still recognized the Article III permissibility of party consent to magistrate court disposition by final judgment: "Reading § 636(c)(1) to require express consent . . . *ensures that the parties knowingly and voluntarily waive their right to an Article III judge.*" *Id.* at 595 (emphasis added).

EBIA attempts to distinguish *Roell* by arguing that it was decided on statutory grounds alone and thus has no relevance to Article III

issues. Pet'r's Br. 32 n.4. But EBIA's reading is too wooden. Article III concerns were keenly present in *Roell*, as the preceding quotation makes clear and the Court's repeated citations to *Schor* confirm. *Roell*, 538 U.S. at 588–90; *id.* at 595 (Thomas, J., dissenting). Indeed, *Roell*'s holding would make little sense if Article III structurally prohibited litigant consent to magistrate judge adjudications. EBIA's reading also would not accord with the Court's practice of allowing complaints of such errors to be forfeited. *Plaut v. Spendthrift Farm., Inc.*, 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases."); *see also Nguyen v. United States*, 539 U.S. 69, 88–89 (2003) (Rehnquist, C.J., dissenting) (reaching constitutional argument unconsidered by majority and deciding that structural-error argument regarding non-Article III judge on appellate panel was forfeited and unsaved by plain-error review).

The more plausible characterization of *Roell* is that there was no need to address any Article III concerns because the Court had already settled the matter in a previous case. In upholding consensual magistrate judge authority to conduct felony *voir dire*, the Court in *Peretz* unambiguously held: "There is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance

with the defendant's consent." *Peretz*, 501 U.S. at 932. The Court explained that "with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Id.* at 933.

Moreover, the Court's implicit recognition of the constitutional propriety of consensual magistrate judge adjudication is unsurprising given that every court of appeals has come to the same result when called upon to address the constitutional issue explicitly.[3] The fact that the consensual bankruptcy court regime mirrors this

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[3] *See Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985); *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985); *D.L. Auld Co. v. Groma Graphics Co.*, 753 F.2d 1029, 1032 (Fed. Cir. 1985); *United States v. Dobey*, 751 F.2d 1140, 1143 (10th Cir. 1985); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 893 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 115–16 (2d Cir. 1984); *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 540 (9th Cir. 1984) (en banc) (Kennedy, J.); *Wharton-Thomas v. United States*, 721 F.2d 922, 929–30 (3rd Cir. 1983).

magistrate system led Chief Judge Easterbrook just recently to question the decision in *Wellness Int'l Network v. Sharif*, 727 F.3d 751 (7th Cir. 2013), relied upon by EBIA to prohibit bankruptcy court consensual judgments. In *Peterson v. Somers Dublin Ltd.*, 729 F. 3d 741 (7th Cir. 2013), Judge Easterbrook pointed out that *Wellness* neglected to address the Seventh Circuit's prior decision in *Geras* upholding the magistrates' similar authority against Article III challenge. *See id.* at 746–47 (noting certiorari grant in this case in questioning *Wellness*).

In sum, the magistrate judge cases confirm the Court's ongoing approval, recognized by the lower courts, of consensual magistrate judge adjudication of private rights.

C. *Stern* Itself Cements this Court's Approval of the Historical Practice of Consensual Adjudicatory Regimes.

Most recently, and in alignment with the longstanding Court tradition of approving consensual adjudicatory regimes within Article III, the Court in *Stern* cited the bankruptcy judge consensual adjudication provision without objection:

> Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court.

> See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (*parties may consent to entry of final judgment by bankruptcy judge in non-core case*).

131 S. Ct. at 2607 (emphasis added); *see also id.* at 2606 ("Vickie argues [that] a party may waive or forfeit any objections under § 157(b)(5), in the same way [that] a party can waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim.") (citations omitted, including explicit quotation of § 157(c)(2)). As the Court further explained, the unobjectionable nature of consensual private-rights resolution by bankruptcy courts was equally accepted by *Stern*'s dissenters:

> The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as establishing only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review. Just so: Substitute "tort" for "contract," and that statement directly covers this case.

Id. at 2615 (emphasis added) (citations, internal quotation marks, and alterations omitted).

EBIA's suggestion that *Stern* casts doubt on the historical practice is puzzling. *See MacDonald*, 286 U.S. at 267 (upholding consensual adjudication of plenary proceedings before referees). It seems to rest on an assumption that because some of the Court's references to the bankruptcy court consensual adjudication statute were in *Stern*'s statutory discussion, not the constitutional discussion, the Court was carelessly citing a law that violated Article III. Pet'r's Br. at 35 n.5. The suggestion that the Court was not attuned to Article III issues in *Stern* is implausible.

The historical precedents, modern magistrate cases, and even *Stern* itself confirm the Court's unwavering trajectory: consensual private-rights adjudicatory regimes that arise wholly within Article III and allow the judiciary and the parties the joint discretion to use or ignore them at their pleasure fully comport with the Constitution.

D. The Fatal Flaw in Unconstitutional Private-Rights Adjudicatory Regimes Has Always Been the Absence of Party Consent.

In *Stern* and other precedents, the Court has consistently identified the lack of party consent

as a critical defect in non-Article III regimes. For example, in *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568 (1985), the Court stated that its decision in *Northern Pipeline* "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Id.* at 584 (emphasis added); *accord Stern*, 131 S. Ct. at 2614–15. And *Stern*'s consent ruling synthesized prior precedent that could have been read to create an overly broad understanding of *ipso facto* counterclaim consent merely by filing a claim in bankruptcy.

Ipso facto consent to summary adjudication of otherwise plenary claims simply by virtue of filing as a creditor was colloquially known as "jurisdiction by ambush" under the 1898 Act. *See, e.g.*, *In re Bokum Res. Corp.*, 49 B.R. 854, 863 (Bankr. D.N.M. 1985) ("This . . . result[s] in a return to the much-maligned jurisdiction by ambush which prevailed prior to 1978."). *Stern* ended this practice. In *Stern*, the respondent, Vickie, argued that the petitioner, Pierce, consented to counterclaim adjudication simply by filing his claim, citing *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) and *Katchen*, 382 U.S. at 475–76 for the proposition that mere filing of a claim constitutes meaningful consent. *Stern*, 131 S. Ct. at 2616.

Stern's rejection of Vickie's position turned on the true meaning of consent. The Court found her implication of consent unwarranted, because all Pierce could truly be said to have consented to was adjudication of his claim and those counterclaims that would necessarily be resolved in processing his consented claim. *Id.* at 2614. The Court solved the *Langenkamp* tension by clarifying that a consensually filed claim only supports implied consent to necessarily intertwined counterclaims. *Id.* at 2617 (citing *Langenkamp*, 498 U.S. at 44–45). In sum, only true consent, which the Court found absent in *Stern*, will suffice.

Indeed, consent is so critical in the Article III analysis that the differing outcomes in *Gomez*, and *Peretz* turned on its presence and absence in otherwise identical circumstances. In *Gomez*, the Court invoked the canon of constitutional avoidance in interpreting the Magistrates Act to forbid magistrate judges from conducting *voir dire* in felony cases without the parties' consent. *Gomez*, 490 U.S. at 864. But consent "significantly change[d] the constitutional analysis" in *Peretz* and led the Court to conclude that "[t]here is no constitutional infirmity in the delegation of felony jury trial selection to a magistrate when the litigants consent." *Peretz* 501 U.S. at 932, 936; *see also Gomez*, 490 U.S. at 870 ("A critical limitation on this expanded jurisdiction [of magistrate final judgment power] is consent."); *Schor*, 478 U.S. at 849 ("[T]he

relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent . . . was relied on as a significant factor in determining Article III forbade such adjudication."); *see also* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 303 (1990) ("[C]onsent provides, if not complete, at least very considerable reason to doubt that the tribunal poses a serious threat to the ideal of federal adjudicatory independence."); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 991 (1988) ("As long as the waiver is not procured by any form of illegitimate pressure, waiver ought to be held permissible . . . .").

Unsurprisingly, every relevant case in which the Court has found constitutional transgression under Article III has involved an objecting defendant forced to litigate its private rights involuntarily before a non-Article III judge. *See Northern Pipeline*, 458 U.S. at 56 (plurality opinion); *id.* at 90 (Rehnquist, J., concurring in the judgment); *Stern*, 131 S. Ct. at 2614; *Granfinanciera*, 492 U.S. at 37. In contrast, consensual regimes have been upheld. *Schor*, 478 U.S. at 849; *Langenkamp*, 498 U.S. 42. And even some involuntary regimes have been upheld, either under the permissibility of the non-Article III adjudication of public rights, *Murray's Lessee v. Hoboken Land &*

Improvement Co., 59 U.S. (18 How.) 272, 283–84 (1855), an administrative agency adjunct test, *Crowell v. Benson*, 285 U.S. 22, 56–61 (1932),[4] or a combination of both, *Union Carbide*, 473 U.S. 568, 593–94 (mandatory arbitration regime). The authority of a district court to refer private-rights controversies to be finally adjudicated by a bankruptcy judge with the parties' consent is thus fully consistent with this Court's precedents.

E. *Schor's* Reference to Unwaivable "Structural" Article III Rights Is Inapposite to this Case.

EBIA repeatedly invokes the Court's discussion in *Schor* concerning the structural, unwaiveable aspects of Article III, *see* Pet'r's Br. 25–26, but EBIA misreads *Schor* and misunderstands the separation of powers doctrine. Unwaiveable, "structural" Article III concerns do not arise in this case.

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[4] In *Stern*, the Court resisted a suggestion that the power of circuit court judges to appoint bankruptcy judges likened bankruptcy courts to administrative adjuncts. *Stern*, 131 S. Ct. at 2618–19. The Court did not address the more important issue, discussed below, of the complete control district court judges have over bankruptcy judges to use or ignore them at their pleasure.

1. *Schor's* "Structural Test" for Separation of Powers Concerns Applies Only to Inter-Branch Encroachment.

Because the adjudication of private rights within the federal system is typically and principally a matter between the parties whose rights are being adjudicated, the Court in *Schor* recognized that Article III's protections are "primarily" personal, and hence waivable: "[Our Article III jurisprudence indicates] that this guarantee serves to protect primarily personal, rather than structural interests. . . . Article III, § 1[] was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision." *Schor*, 478 U.S. at 848. Additionally, however, the Court qualified that in some—but not all—cases, Article III concerns can rise to structural levels beyond the parties' ability to waive:

> Article III, § 1 . . . [bars] congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. *To the extent this structural principle is implicated in a given case*, the parties cannot by consent cure the constitutional difficulty . . . .

Id. at 850 (emphasis added) (citations and internal quotation marks omitted).

This case is not one in which the structural concern is implicated. Congress has not undertaken to "emasculate" constitutional courts—far from it. Bankruptcy judges perform their functions entirely within the confines of the judicial branch; they hear bankruptcy cases at the pleasure of Article III judges, who closely supervise their work and review all questions of fact and law. By contrast, the subset of cases implicating structural separation of powers concerns comprises those involving the "encroachment or aggrandizement of one branch at the expense of the other[s]." *Id.* This interpretation tracks *Schor*'s analysis, in which every source cited references encroachment or aggrandizement between the branches. Indeed, even oft-quoted Federalist 78, from which EBIA quotes a snippet, Pet'r's Br. 21-22, explains in full context that its concern over periodical appointments stems from inter-branch encroachment:

> If the power of making [periodical appointments] was committed either to the Executive or the Legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the People, or to persons

> chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78, at 546 (Alexander Hamilton) (H. Dawson ed. 1876); *see also United States ex rel Toth v. Quarles*, 350 U.S. 11, 16 (1955) ("The provisions of Article III were designed to give judges maximum freedom from the possible coercion or influence by the executive or legislative branches of the Government.").

Neither modern Court precedents nor historical sources indicate that any Article III separation-of-powers encroachment concern would arise when Article III judges may at their election refer matters to consensual adjudication before a bankruptcy judge. To the contrary, the concern is with inter-branch interference with the judicial power.[5] As the Court explained in *Peretz*:

> Even assuming that a litigant may not waive structural protections provided by

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[5] EBIA seizes on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), as an example of what it contends is an intra-branch separation-of-powers problem. Pet'r's Br. 19. It is mistaken. *Marbury* involves the original subject matter jurisdiction of this Court under the Constitution, a topic that has nothing to do with this appeal.

> Article III, see *Schor*, we are convinced that no such structural protections are implicated by the [consensual magistrate] procedure followed in this case. Magistrates are appointed and subject to removal by Article III judges. *The 'ultimate decision' whether to invoke the magistrates' assistance is made by the district court, subject to veto by the parties.* . . . [T]here is no danger that use of the magistrate involves a 'congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts.

Peretz, 501 U.S. at 937 (emphasis added) (citations omitted); *see also Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in the judgment) (agreeing that Constitution creates no obstacle to waiver of right to Article III judge).[6] Wholly intra-Article III regimes thus do not even implicate *Schor*'s encroachment concerns. Consequently, this case

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[6] EBIA references the impermissibility of *political* branch waiver of structural constraints, Pet'r's Br. at 17 (citing *INS v. Chadha*, 462 U.S. 919 (1983)), an inapposite concept. The President cannot "waive" the Presentment Clause on behalf of every citizen in the country without each citizen's consent; nor could he "waive" that Clause in a way that could ever bind a future President. Private parties, by contrast, can bind themselves by waivers in the adjudication of their private rights.

does not turn on whether Congress gave too much power to bankruptcy courts (although it might raise questions whether the district courts delegate too much power to bankruptcy courts).

2. The Consensual Bankruptcy Court Adjudication Regime Within Article III Evinces No Impermissible Delegation of Judicial Authority.

The fact that consensual adjudicative schemes, like the bankruptcy and magistrate judge ones, do not exhibit inter-branch encroachment does not necessarily end all structural inquiry. *See Peretz*, 501 U.S. at 956 (Scalia, J., dissenting) ("[T]he Constitution guarantees . . . that none of the branches will *itself* alienate its assigned powers. Otherwise, the doctrine of unconstitutional delegation . . . is a dead letter."); *Gonzalez*, 553 U.S. at 265–66 (Thomas, J., dissenting) (same); *Pacemaker*, 725 F.2d at 544 (Kennedy, J.) (disaggregating from encroachment concern the additional problem of "the erosion of the central powers of the judiciary by permitting it to delegate its own authority").

In this regard, the nondelegation doctrine, if applied to the judiciary, may well prohibit the complete abdication or self-inflicted diminishment of the judiciary's core constitutional role. *Cf. A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)

("The Congress is not permitted to abdicate or to transfer to others the essential legislative function[] . . . ."). But the nondelegation doctrine has never required the complete stagnation and insularity of all decision-making functions. For example, Congress may delegate decision-making authority to an administrative agency, so long as Congress provides an "intelligible principle" restraining the agency's discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

Applying this doctrine to the judicial power would involve considering whether the judiciary retained sufficient control and accountability over the delegated actors. There can be no question that Article III judges maintain robust involvement in bankruptcy, with appellate review of all questions of law and fact, and the overarching power to cancel the reference at any time—a power commonly invoked in bankruptcy, *see, e.g.*, Order Regarding Referral of Title 11 Proceedings to the United States Bankruptcy Judges for This District (Jan. 23, 1997, *reprinted in* Bankruptcy Court Decisions News and Comment, Feb. 4, 1997), at A1, A8 (suspending all referrals to bankruptcy courts in the District of Delaware for four years following controversy involving case assignments).

More importantly, it is doubtful whether vindication of party consent to bankruptcy court adjudication even invokes the concerns of

transparency and accountability animating the nondelegation doctrine. Permitting final adjudication in bankruptcy court upon request of the parties is not judicial shirking of difficult questions; it is respecting the autonomy of the parties and is no more a constitutional abdication than confirming an arbitration award, dismissing a case upon a consensual settlement agreement, or even allowing a clerk of court to enter a default judgment. *See Schor*, 478 U.S. at 855; Fed R. Civ. P. 55(b)(1); *see also Heckers*, 69 U.S. at 132–33 (holding that the delegation of a case to a referee without party consent would be an impermissible abdication, but upholding the same delegation with consent).

Viewed in this light, consensual adjudication regimes within Article III do not impermissibly delegate the judicial power. As then-Judge Kennedy recognized, "[f]rom a realistic and practical perspective, reference of civil cases to magistrates with the consent of the parties, subject to careful supervision by Article III judges, may serve to strengthen an independent judiciary, not undermine it." *Pacemaker*, 725 F.2d at 546.

3. Consensual Adjudication Regimes Within Article III Otherwise Satisfy *Schor*.

Even if the Court were to apply *Schor*'s balancing test to structural concerns arising

wholly within the judicial branch, consensual bankruptcy adjudication would pass muster. To begin with, a key consideration weighing heavily in favor of its legitimacy is its consensual nature.[7] As the Court explained in *Schor*:

> [T]he decision to invoke [CFTC adjudication] is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

Schor, 478 U.S. at 855.

In this case, there is no serious argument that EBIA did not consent to proceeding in bankruptcy court on summary judgment.

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[7] Consent, while critically important when this analysis is triggered, cannot be the dispositive factor, or the structural analysis would become redundant; thus, "notions of consent and waiver cannot be dispositive." *Schor*, 478 U.S. at 851.

Instead, EBIA emphasizes that its consent was not required as a statutory precondition to bankruptcy court resolution of a core proceeding. Pet'r's Br. at 32. But EBIA's answer revealed its belief that the fraudulent conveyance action was non-core, making its position irrelevant. J.A. 80. The consent so crucial to *Schor*'s consideration of structural issues was unquestionably present here.

In addition to consent, *Schor* counsels examining the degree to which the non-Article III forum exercises Article III judicial power, the origin and importance of the right to be adjudicated, the concerns that drove Congress to depart from Article III, and the "degree of judicial control saved to the federal courts." *Schor*, 478 U.S. at 852–55. While conceding that bankruptcy and magistrate judges exercise more judicial power than the CFTC, Arkison submits that the centuries-old practice of bankruptcy adjudication driven by the need for an "inexpensive and expeditious alternative to existing fora," *id.* at 836, justifies the consensual adjudication of bankruptcy-related private rights under *Schor's* flexible and pragmatic test. Finally, on the critical factor of ongoing control and supervision by Article III judges, the bankruptcy judges remain clearly subordinate and subject to the control and supervision of Article III courts, which have the power to decline references ex ante and withdraw them ex post.

F. EBIA's Broad Arguments Undermine the Court's Careful Insistence That *Stern*'s Holding Was Narrow.

Perhaps the most remarkable argument EBIA appears to advance is its claim that *Stern*'s scope was so broad-sweeping that it now precludes bankruptcy judges from entering judgment on virtually anything, Pet'r's Br. 20–24, including even the traditional adjustment of creditor claims that the Court has repeatedly invoked hypothetically as the quintessential permissible use of specialized bankruptcy courts. *E.g.*, *Northern Pipeline*, 458 U.S. at 71 (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right,' . . . ."); *see also Union Carbide*, 473 U.S. at 599 (Brennan, J., concurring in the judgment) ("Properly understood, the [public rights analysis of the *Northern Pipeline* plurality] does not place the Federal Government in an Art. III straitjacket whenever a dispute technically is one between private parties. We recognized that a bankruptcy adjudication, though technically a dispute among private parties, may well be properly characterized as a matter of public rights."). In addition to upending centuries of bankruptcy practice and invalidating the entire magistrate judge system, EBIA's position rests upon a flawed assumption that *Stern* was

intended to destabilize the very foundation of the bankruptcy system.

EBIA is not unique in its misreading. A few lower courts have now over-read *Stern* as an unraveling of the entire magistrate and bankruptcy judge systems, refusing to take the Court at its word that the opinion was modest. *See, e.g.*, *Frazin v. Haynes & Boone* (*In re Frazin*), 732 F.3d 313, 2013 WL 5495920, at *3 (5th Cir. 2013) ("Although the Court [in *Stern*] stated that its decision was 'narrow,' its reasoning was sweeping.") (citation omitted); *cf. In re Ambac Fin. Grp.*, 457 B.R. 299, 308 (S.D.N.Y. 2011) ("Unfortunately, *Stern* . . . has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court.").

EBIA and these stray lower courts distort *Stern*. Since the nineteenth century, the bankruptcy system has divided matters into proceedings that bankruptcy judges may finally adjudicate and those that they may not (absent the consent of the parties). While the relevant line between these types of proceedings has been labeled in different ways, one constant persists: certain matters are central—"core"—to the bankruptcy power, such as the expeditious resolution of claims against the bankruptcy res. Adjudication of those matters by bankruptcy judges or their precursors, with or without party

consent, has never been held to violate Article III.

Although the Article III permissibility of bankruptcy court authority over claims administration is not at issue in this appeal, EBIA's arguments might be read to call it into question, and Arkison therefore responds in an abundance of caution. *Cf. Stern*, 131 S. Ct. at 2614 n.7 (noting neither party asked the Court to decide whether bankruptcy claims administration and discharge is a public right).

When Congress's 1978 abandonment of the summary/plenary distinction was struck down in *Northern Pipeline*, Congress returned to a bifurcated system that essentially preserves the historical dichotomy of bankruptcy proceedings in a scheme of specialized bankruptcy adjudicators. *Stern* holds no more than that Congress got the line slightly wrong. *Stern* never called into question Congress's power to maintain the historical practice of bankruptcy administration before non-Article III judges. *Stern*'s holding should thus be read for nothing more than the "narrow" opinion it purports to be, *Stern*, 131 S. Ct. at 2620; EBIA's suggestion that it calls into doubt the entire system of bankruptcy judges is unwarranted.

It is true that the Court has never officially sanctioned the bifurcated system and concomitant vesting of full adjudicative

authority in bankruptcy courts over truly "core" claims. *See, e.g.*, *Stern*, 131 S. Ct. at 2610–11, 2614 n.7. But it is worth commenting that the Court's hesitation to recognize and endorse the historical practice seems to rest upon a mistaken foundation from a footnote in *Granfinanciera*, where the Court appeared to back away from its earlier suggestions that *in rem* resolution of bankruptcy claims and discharge entitlement is likely a public right adjudicable by a non-Article III judge. 492 U.S. at 56 n.11. Concerned that this position had met with "substantial scholarly criticism," the Court clarified that it had never squarely so held, either before or after 1978. *Id.*

The Court's concerns over scholarly criticism were actually unwarranted. This purported "criticism" consisted of only three articles. The first was a law-and-economics piece arguing that bankruptcy laws should be about the procedural negotiation of state-law property and contract rights and thus not have any federal, public-rights component whatsoever. *See* Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25 (1982). The second (devoid of historical analysis) was a commentary on the already-discredited 1978 bankruptcy court system and was written before the 1984 amendments re-bifurcated bankruptcy proceedings. *See* David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). And the final

article expressly states, in a single footnote in an otherwise lengthy study of jury trials, that it does not address the constitutional issue left open by *Northern Pipeline*. *See* S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1040 n.345 (citing *Arnold Print Works v. Apkin*, 815 F.2d 165, 169 (1st Cir. 1987) (Breyer, J.) as illustrative of courts' assumptions that the public rights doctrine renders the core bankruptcy functions permissible). While the Court's caution was understandable, it was probably overstatement to consider these works "substantial criticism," especially in light of the overwhelming evidence of longstanding (and legitimate) acceptance of bankruptcy procedures and practices.

On the contrary, *every* lower court to decide the issue has held that the truly core functions of bankruptcy law (not the type of private-rights dispute at issue in *Stern*) are permissible matters for non-Article III adjudication under the public rights doctrine propounded by *Martin's Lessee* and its successors up through *Stern*. *See, e.g.*, *Carpenters Pension Trust Fund for N. Cal. v. Moxley*, 2013 WL 4417594, *4 (9th Cir. Aug. 20, 2013); *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 196 n.11 (3d Cir. 1999); *Kirschner v. Agoglia*, 476 B.R. 75, 79 (S.D.N.Y. 2012). Those decisions are in accord with scholars whose historical research has

consistently noted the routine final adjudication of bankruptcy cases by judicial officers since the English bankruptcy commissioners. *See, e.g.*, Plank, *supra*, at 573, 575–80, 590–96, 600–10 (1996); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 719–22 (2004) (suggesting commissioners, like sui generis ecclesiastical courts, arose neither in law, equity, nor admiralty and thus may not have even exercised "judicial power" as the framers understood it); 2 WILLIAM BLACKSTONE, COMMENTARIES *471–88; Tabb, *History of the Bankruptcy Laws*, *supra*, at 7–12; McCoid, *supra*, at 28–33, 37. Should the Court be inclined to take up EBIA's provocative arguments, it should not only reject them but confirm that the practices in place since the ratification of the Constitution comport with Article III, whether under its ongoing interpretation of the pragmatic and flexible public rights doctrine or in recognition of the historical tradition.[8]

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[8] As Justice Scalia fairly observes, if historical practice is the basis for Article III exceptionalism in permitting private-rights adjudications outside Article III by courts-martial and territorial courts, then there is no reason why the list of exceptions in *Northern Pipeline* is or should be exhaustive. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring)). For example, no justification readily presents itself why the military regulation power should provide any surer a bypass of Article III for private-rights

II. Constitutionally Permissible Consent May Be Implied.

As discussed above, this Court held in *Roell* that consent simpliciter suffices to permit magistrate judge adjudication and may be implied. *Roell*, 538 U.S. at 590. *Compare also* § 157(c)(2) (requiring only consent) *with* § 157(e) (requiring express consent). EBIA offers no argument to overrule *Roell*, and members of the Court who found themselves in dissent in *Roell* have followed the decision as stare decisis. *See Gonzalez*, 553 U.S. at 251–52 (2008) (citing *Roell*'s rule of implied consent in rejecting Article III challenge to magistrate judge authority).

EBIA tries to distinguish section 636's magistrate provisions from section 157 by noting that Congress requires more specific protections of consent under the former. Pet'r's Br. 33–36. But the bankruptcy consent scheme provides the same protections by rule as section 636(c)(2) provides by statute. Like section 636(c), Rule 7012 ensures that consent is knowing and voluntary. Rule 7012 requires responsive pleadings to "include a statement that the party does or does not consent to entry of final orders or judgments by a bankruptcy judge." Fed. R. Bankr. P. 7012. Thus, there is no meaningful

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adjudication than the bankruptcy power, which the Court has held to have its own exceptional constitutional provenance. *Cent. Va. Cmty. Coll.*, 546 U.S. at 370.

difference between magistrate and bankruptcy judge consent. And, as *Roell* confirms, violation of a rule designed to protect consent cannot be used to lay a foundation to evade an adjudicatory outcome the defendant does not like.[9]

To the extent the statute and only the statute were to be relevant for some reason, the presence of any arguably more specific protections in the Magistrate Act than in the bankruptcy statutes would be a product of the statutes' respective historical contexts. The magistrate provisions were enacted against an explicit congressional backdrop of fear of "coerced" consent into magistrate courtrooms. *Roell*, 538 U.S. at 589 ("It was thus concern about the possibility of coercive referrals that prompted Congress to make it clear that the voluntary consent of the parties is required before a civil action may be referred to a magistrate for a final decision.") (internal quotation marks omitted). But coercion was never cited by anyone as a concern in bankruptcy. *See* 130 Cong. Rec. 6045 (1984)

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[9] Some might call this "implied consent;" some might say "waiver" or "forfeiture." *See Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 113–14 n.20 (1st Cir. 2004) (Lynch, J., dissenting) (noting difference in terminology and lack of relevant distinction in the bankruptcy context); *cf. Peterson v. Somers Dublin*, 729 F.3d at 746–47, (Easterbrook, C.J.) (suggesting distinction between waiver and forfeiture could plausibly have relevance in this specific context).

(remarks of Rep. Kastenmeier) (discussing consent without reference to risk of coercion). This is not surprising: bankruptcy proceedings are largely populated by repeat-player trustees (the debtors themselves are rarely involved in litigation of non-core matters). In addition, creditors, too, are often repeat-player financial institutions, in contrast to the pro se parties who might find themselves before a magistrate (as in *Roell*, 538 U.S. at 597 (Thomas, J., dissenting)).

More importantly, the wide swath of adjudicatory authority conferred on magistrate judges dwarfs the more narrow sphere in which bankruptcy judges operate. Bankruptcy judges may only finally decide private-rights controversies "related to" a debtor's bankruptcy proceeding, 28 U.S.C. § 1334(b), and even then only upon the parties' consent, *id.* at § 157(c). Magistrate judges, by contrast, can with consent decide "any or all proceedings in a jury or nonjury civil matter . . . ." *Id.* at § 636(c)(1). They may additionally decide criminal misdemeanor matters. 18 U.S.C. § 3401(a). Magistrates' presence in the more constitutionally protected criminal sphere renders understandable any heightened consent protections Congress may have required.

III. Implied Consent on the Facts of this Case Was Properly Found by the Courts Below, But The Court Need Not And Should Not Decide that Question.

Despite EBIA's protestations that it was railroaded into consenting by binding precedent, Pet'r's Br. II.B, it could, and did, fully consent to the resolution of its summary judgment motion by the bankruptcy judge. But more importantly, because EBIA received the full Article III review it desired, the Court need not wade into that fact-specific quagmire.

A. The Court Need Not and Should Not Decide Whether and When, on the Facts of this Case, EBIA Consented.

The unique procedural posture of this case renders factual analysis of EBIA's consent unnecessary. This bypass opportunity is important, because there are compelling prudential reasons why the Court should not resolve the question.

The posture of this case—a de novo district court entry of judgment on a summary judgment motion—renders constitutionally irrelevant what happened in the bankruptcy court prior to that point. Nobody contends that an Article III district judge was unable to enter a fraudulent

conveyance judgment against EBIA. Chief Judge Pechman could have withdrawn the reference and heard the summary judgment motion herself. And that is effectively what she did when, on January 21, 2011, she conducted a de novo review that accorded the bankruptcy court no deference. As such, EBIA got full Article III consideration. Indeed, if this Court for any reason were to vacate and remand for further proceedings, presumably Chief Judge Pechman would be within her rights to re-enter the same order.

Examples of this procedural quirk are hard to find, but once again the magistrate judge system provides an analogous field. In *Estate of Conners v. O'Conner*, 6 F.3d 656, 659 (9th Cir. 1993), the magistrate judge did not have authority to enter a postjudgment order of attorney's fees. The district court, however, caught the error and subjected the flawed order to de novo review, recasting it as proposed findings of fact and conclusions of law. Approving this outcome and the functional mootness of the appellant's complaint, the Court of Appeals summarized: "[The] error . . . was cured by the district court's later de novo review of the magistrate's findings and conclusions, and the court's entry of its own

order awarding attorney's fees and costs." *Id.*[10] The same analysis applies here.

The only way EBIA could have suffered cognizable injury would be if the bankruptcy court's judgment was accorded preclusive effect, as was the case in *Stern*, or if the district court had given the bankruptcy court decision deference on appeal. Neither occurred. EBIA tries to recast Chief Judge Pechman's review as one based on an evaluation of "substantial evidence" rather than de novo. Pet'r's Br. 9. This is false. Indeed, the district court was explicit about its standard of review. Pet. App. 45a ("The Court reviews the Bankruptcy Court's order de novo.").[11]

Moreover, not only did the district court state expressly its standard of review, its detailed opinion reveals a thorough and searching

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[10] Similar mootness arguments can be made regarding the alter-ego claim, which is not even a matter of private right but of federal bankruptcy law arising directly under the Bankruptcy Code's definition of "debtor" under 11 U.S.C. § 101(13) of Title 11. Affirmance of this claim renders moot any error on the fraudulent conveyance claim.

[11] The court offhandedly stated at one point that "[t]here is substantial evidence supporting" one of the bankruptcy court's conclusions, Pet. App. 50a, but this observation does not contradict the court's express declaration that it was conducting a de novo review, see *id.* at 45a.

inquiry. *Id.* at 41a–52a. It found EBIA's arguments utterly meritless, holding that EBIA "failed to raise *any* dispute of fact that might preclude the entry of [summary] judgment." *Id.* at 46a (emphasis added). The court further held that, in contrast to Arkison's considerable evidence (including the debtor's own accounting records showing transfers out to EBIA), the only evidence EBIA submitted was a "self-serving" declaration sheepishly proclaiming either ignorance of the transfers or at best a "clerical error." *Id.* at 47a–49a. Similarly, in the face of overwhelming evidence of actual fraud (including wholesale transfers of the debtor's assets within three days of an adverse arbitration ruling), the district court ultimately concluded there was no "plausible basis for reversal." *Id.* at 51a. As Chief Judge Pechman explained:

> [EBIA] has done nothing to point out where in the record contradictory facts exist. It attempts to argue that EBIA received nothing from [the debtor] and that it was an entirely different business. This is supported only by Defendant Paleveda's self-serving declaration, which, as explained above, fails to raise a genuine issue of material fact.

Id. at 49a.

In sum, EBIA got all the Article III consideration it could have hoped for if the

matter had been litigated wholly and exclusively in the Article III district court. Further proceedings on the unique procedural posture of this case would be undeserved, fruitless, and wasteful.[12] Moreover, there are additional prudential reasons the Court should exercise its power not to decide the consent issue.

First, and most fundamentally, the Court did not grant certiorari on the question. *Exec. Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880 (June 24, 2013). To be sure, the Court doubtless has latitude in what it decides in any given case, but Arkison respectfully submits that the Court should hew closely to the questions presented.

Second, the issue of how to properly detect implied consent in a bankruptcy case when parties violate Rules 7008 and 7012 (as EBIA did here) is not yet ripe for the Court's consideration. This is an active issue percolating through the lower courts. Some have held that participation before a bankruptcy judge by a represented party is enough to draw an implication of consent; others have required "something else" beyond mere non-objection. *See Sheridan*, 362 F.3d at 103 n.5 (collecting cases); *Hasse v. Rainsden (In re Pringle)*, 495 B.R. 447, 457–62 (B.A.P. 9th Cir. 2013) (proposing rebuttable

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[12] This functional mootness point entitles Arkison to prevail even if he loses on every other argument in this appeal.

presumption of consent when represented parties proceed in bankruptcy court and describing the instant case as "sandbagging" that would warrant implication of consent under even the most stringent test); 1 Collier on Bankruptcy, ¶ 3.03[4] (16th ed. 2011) (collecting cases and recommending that "failure to interpose an objection at the pleading stage" be deemed "consent to the final order being entered by the bankruptcy judge"). Unless and until it comes to the Court on a properly filed petition, the Court should stay its hand.

Finally, the question of how best to imply consent to adjudicate a private-rights controversy designated as "core" under section 157(b) (a "Stern claim") in a case filed before *Stern* came down is a limited one not worth the Court's going beyond the certiorari grant. By now, all litigants in newly commenced bankruptcy cases know of *Stern* and invoke *Stern* by name when making their objections. For these reasons, the Court can simply affirm the findings of the courts below without parsing the point at which EBIA consented and designing the best test to be applied in determining that question.

B. EBIA Unequivocally Consented to Bankruptcy Court Adjudication of the Summary Judgment Motion.

The court below held that EBIA consented to bankruptcy judge resolution of the summary judgment motion by virtue of the JSR in which it participated that asked Judge Jones to defer the motion to withdraw the reference pending further pretrial proceedings, a report which specifically included the possibility of a motion for summary judgment. Pet. App. 29a-30a. EBIA trumpets repeatedly that it did not sign the JSR, Pet'r's Br. 7, 12, 44, which is factually correct but legally irrelevant. Judge Jones told counsel to confer and file a report. Counsel for every party but Paleveda participated in the conference, and thereafter a report was circulated and filed. *See* Pet. App. 73a. The fact that EBIA's counsel never bothered to sign the report—in the absence of any objection whatsoever to its contents, both when it was circulated and again when it was filed—cannot now be used as a sandbag. *See id.* at 28a–30a.

Moreover, ever since the Court's decision in *Northern Pipeline*, litigants have been on notice that, if they are embroiled in a controversy in a bankruptcy court that they believe involves a private right, and they do not want the bankruptcy judge to finally decide the matter, they have a legal right to object and must take action to vindicate their right. And ever since

the Court's decision in *Granfinanciera*, litigants have been on notice that a fraudulent conveyance action involves a private-rights controversy. Given that *Stern* acknowledges and reaffirms the holdings in both cases, EBIA's argument that it did not know that it could withhold consent to bankruptcy court adjudication rings hollow.

EBIA's tactical decision to take its summary judgment chances in bankruptcy court was made in 2010 at the time the Court of Appeals handed down its own opinion in *Stern*, which this Court functionally affirmed on different grounds.[13] The Court of Appeals' *Stern* decision made clear that section 157's inclusion of private rights as core proceedings raised serious constitutional problems under Article III. Indeed, Pierce Marshall himself, the respondent in *Stern*,

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[13] While the Court of Appeals' *Stern* decision actually came down a few days after (March 19) the parties requested that pretrial proceedings continue in the bankruptcy court (March 15), the JSR lay pending with the district court for ample time after *Stern* to enable amendment before the district court entered its order (March 26). And, of course, *Stern* was under reserve for quite some time before that, and was on remand from this Court from a *Jarndyce-v.-Jarndyce*-aged, high-profile proceeding well known to the entire Ninth Circuit bankruptcy community. Even after the bankruptcy court's summary judgment order, EBIA never revived the reference withdrawal motion, causing it ultimately to be dismissed as abandoned. Pet. App. 60a–61a.

strenuously and repeatedly raised the Article III problems before the Court of Appeals and each of the other lower courts, mindful of the Ninth Circuit's then-precedents and well before this Court decided his case. *Stern*, 131 S. Ct. at 2607–08 (noting that although Pierce was late in objecting to bankruptcy court adjudication *of his defamation claim*, he had repeatedly asserted from the beginning his Article III objections with respect to *Vickie's counterclaim*).

Doubtless, however, the most important tactical consideration on EBIA's mind in making its decision to proceed before the bankruptcy court was the fact that its co-defendant, ARIS, had been recently successful there in resisting summary judgment. But the Court need not speculate on EBIA's motivations now that the motion has been decided and EBIA has lost. A contrary approach would enable sandbagging of the most invidious sort. *See In re Johnson*, 960 F.2d 396, 400 (4th Cir. 1992).

EBIA makes much of the fact that an old Ninth Circuit case predating *Granfinanciera* purportedly negated any Article III claim it might have had as a fraudulent conveyance defendant, Pet'r's Br. 41 (citing *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987), *overruled by Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553 (9th Cir. 2012)), but the ongoing vitality of that case was at best in doubt after *Granfinanciera* and at

worst already overruled by it. Pet. App. 14a-18a. More importantly, it did not shake EBIA from its pugnacious strategy of insisting that Atkison's fraudulent conveyance claim was non-core. The only basis for such a position (based on the clear statutory definition of a fraudulent conveyance as core, 28 U.S.C. § 157(b)(2)(H)) is that EBIA thought the treatment of a fraudulent conveyance against a non-filing defendant as core would violate Article III. In other words, EBIA was taking a "*Stern* claim" stance by demanding the claim's treatment as non-core. In addition, EBIA was never shy or unaware of its constitutional rights; it stuck to its Seventh Amendment guns, citing *Granfinanciera* in bringing its motion to vacate the trial date before abandoning the reference withdrawal. Pet. App. 79a. Accordingly, the suggestion that shrinking-violet EBIA had no idea it could take the bold constitutional stand on the treatment of fraudulent conveyance actions in bankruptcy court that was later vindicated by *Stern* is impossible to square with the record.

IV. *Stern* Creates No Insoluble "Gap" in Section 157.

This Court's holding in *Stern* creates what at first appears to be a "gap" in section 157 that in fact closes upon closer scrutiny. The apparent gap arises because the statute focuses on proposed findings of fact and conclusions of law only for *non-core* claims, 28 U.S.C. § 157(c)(1),

but *Stern* claims are statutorily *core*, and core claims do not have an analogously explicit statutory provision for such reports and recommendations. Only one court of appeals has suggested a problem, concluding that bankruptcy courts are powerless to proceed with *Stern* claims in any way at all. *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011). This approach, however, has been roundly rejected and subjected to withering academic treatment. Brubaker, *supra*, at 143 n.104 (criticizing *Ortiz*'s conclusion as "[i]ll-considered, ill-advised dicta" that should be "simply ignored").

All other lower courts seem to remain unfazed. Because a *Stern* claim by definition is one that is statutorily designated as core but cannot constitutionally be treated as such, it must be treated differently from a constitutionally core matter. And as "core" and "non-core" are exhaustive categories of proceedings in bankruptcy cases, *Stern*, 131 S. Ct. at 2604, almost all courts have done the only logical thing: treat *Stern* claims as though they were non-core, restricting bankruptcy judges in the absence of party consent to proposed findings of fact and conclusions of law. *E.g.*, *Dang v. Bank of Am. N.A.*, 2013 U.S. Dist. LEXIS 54833, at *39–41 (D. Md. Apr. 17, 2013) ("A majority of courts considering this issue in *Stern*'s wake have concluded that a bankruptcy court has the power to submit proposed findings of fact and

conclusions of law on claims for which they cannot issue final judgments."); *Rothroch v. PNC Bank, N.A. (In re Parco Merged Media Corp.)*, 489 B.R. 323, 325–27 (D. Me. 2013) (noting "emerging consensus").

Indeed, this is what the district court did in *Stern*, when it held Vickie's tort counterclaim could not be treated as core and thus recast the bankruptcy court's purported judgment as a report and recommendation. *Stern*, 131 S. Ct. at 2602. This Court recounted that procedural treatment with approval. *Id.* at 2620.

These lower courts have this issue right. But there is an even simpler way to deal with the statutory gap: recognize that it is not really a gap at all.

The starting point is section 157(a), which allows a district court, if inclined, to "provide that any or all cases under title 11 and any or all proceedings . . . arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). This broad power does not specify whether a reference will be for final judgment or for recommendation only. The only restrictions are found later on, under section 157(c). That subsection constrains referred *non-core* proceedings to proposed findings of fact and conclusions of law only, unless the parties consent to entry of judgment. *Id.* at 157(c)(1), (2).

Referred *core* proceedings, by contrast, have no restrictions: "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings . . . referred under subsection (a) of this section, *and may* enter appropriate orders and judgments, subject to review under section 158 . . . ." *Id.* at § 157(b)(1) (emphasis added).

The text of section 157(b)(1) reveals three things. First, bankruptcy judges may, but not must, enter orders and judgments in core proceedings. *Cf. id.* at § 157(c)(1) (bankruptcy judge "shall" enter proposed findings of fact and conclusions of law in non-core proceedings). Second, when they do enter an order or judgment, that decision is subject to review under section 158, which spells out the appellate procedure for final bankruptcy court orders and judgments. *Id.* at § 158. Third, "hearing and determining" is something other than (and presumably something lesser than) entering an "appropriate order or judgment."

Accordingly, section 157(b)(1) permits a bankruptcy judge to hear and determine *but not* make an order or judgment (unlike section 157(c)(2)), if the referring district court so directs under section 157(a). The logical output of such a proceeding would be a proposed finding of fact and conclusion of law, which, unlike a judgment or order, needs no statutory authorization.

EBIA fights the clear statutory text by saying "may hear and determine" should be read to mean "must determine," and in turn argues that "determine" means issue a final judgment resolving the cause. Pet'r's Br. 48–50. It goes so far with this logic as to contend that there is thus no authority for a *district* court judge to enter a final judgment on a referred core claim. *Id.* at 49. ("Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment as an initial matter in a core proceeding that has been referred to the bankruptcy court."). In addition to lacking textual support for its startling claim, EBIA's interpretation fails by reading section 157(d) right out of the statute. Surely when an Article III judge exercises its superintendent power to withdraw the reference in a core proceeding, it has eminent authority to "enter judgment as an initial matter." To conclude that *Stern* precludes a district judge from entering judgment in such a core proceeding is nonsensical.

The near unanimity of lower courts in surmounting the purported gap makes sense, as a contrary holding would be absurd. It is impossible to concoct a plausible reason why Congress would choose to accord greater adjudicative authority to bankruptcy court judges over *non-core* claims—which are by definition only tangential to the bankruptcy process—than to the more centrally bankruptcy-connected *Stern* claims, such as fraudulent

conveyance actions, which are statutorily *core*. EBIA suggests three concentric classes of bankruptcy matters: (1) those that are statutorily and constitutionally core (at the heart of bankruptcy); (2) *Stern* claims (statutorily core but not constitutionally so); and (3) those that are non-core (the most tangentially related to the bankruptcy case). It then contends the statute should be read as according the following adjudicatory treatment. Class 1: bankruptcy judge may issue final judgments; Class 2: no bankruptcy judge authority for anything at all; Class 3: bankruptcy judge may issue reports and recommendations. This "doughnut reading" with a gap for Class 2 is facially absurd, and EBIA has proposed no non-absurd reason to read the statute in this way.[14]

Finally, EBIA's argument insisting on a wholesale congressional rewrite ignores the severance doctrine. When "confronting a constitutional flaw in a statute, [the Court tries] to limit the solution to the problem, severing any

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[14] The only court Arkison can find that has taken this route is *Ortiz*, 665 F.3d at 915, followed up by the *Ortiz* author in *Wellness*, 727 F.3d at 776–77. *Wellness* offers no defense of its reading of the statute against the absurdity doctrine and finds itself boxed into the corner of suggesting that Congress may have permitted final adjudication over non-core claims, per section 157(c)(2), but left no authority whatsoever for bankruptcy courts for *Stern* claims. 727 F.3d at 772, 775–77.

problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (citation and internal quotation marks omitted). A full statute should be struck down only if Congress expressed legislative intent that the act should fall in its entirety. "Unless it is 'evident' that the answer is no, we must leave the rest of the Act intact." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607, (2012) (citation omitted).

With the 1984 amendments, Congress sought to confer on bankruptcy judges as much authority as possible while respecting the constitutional limits announced by the Court in *Northern Pipeline*. *See, e.g.*, 130 Cong. Rec. H 7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier) ("Mr. Speaker, [two] years ago yesterday the Supreme Court of the United States decided the Marathon Case[,] finding a part of the 1978 Bankruptcy Act unconstitutional. . . . I am pleased that we were able to fashion a constitutional, workable bankruptcy court system."). When *Stern* held that Congress got the line slightly wrong, the remedial outcome was not a mystery: keep the statute, with the line at the constitutionally appropriate place. Only such an outcome confirms that *Stern* was the narrow holding it promised it was.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 8, 2013

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Argument:

I. Individual litigant consent cannot cure the structural Article III violation identified in *Stern* 1

A. Vesting the power to enter judgment of the United States outside of Article III courts is a structural violation 3

B. "Consent" in an individual case does not cure a *Stern* structural violation 5

C. Even if consent in an individual case were sufficient, it would have to be knowing and voluntary consent, which could not exist here 6

II. Appellate review cannot cure the absence of a valid Article III judgment 11

III. Vindicating Article III in this case does not require the Court to overturn precedent or other statutory schemes 16

A. Respondent's historical authorities are inapposite 16

B. Finding a structural violation here does not require invalidating other statutes 18

IV. Bankruptcy judges lack statutory authority to issue proposed findings and conclusions in core proceedings 20

Conclusion 24

TABLE OF AUTHORITIES

Page(s)

Cases:

Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 (1947) 11

Burnham v. *Sup. Ct. of Cal.*, 495 U.S. 604 (1990) 11

Clinton v. *City of New York*, 524 U.S. 417 (1998) 4

Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 1, 2, 5

Cortez Byrd Chips, Inc. v. *Bill Harbert Const. Co.*, 529 U.S. 193 (2000) 20

Diamond Mortg. Corp. v. *Sugar*, 913 F.2d 1233 (7th Cir. 1990), cert. denied, 498 U.S. 1089 (1991) 10

Duck v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), cert. denied, 485 U.S. 1006 (1988), overruled by *Executive Benefits Ins. Agency* v. *Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012) ... 7, 8

Estate of Conners v. *O'Connor*, 6 F.3d 656 (9th Cir. 1993), cert. denied, 510 U.S. 1045 (1994) 13

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 12

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 3, 22

Cases—Continued:

Freytag v. *Comm'r Internal Revenue*, 501 U.S. 868 (1991) 11, 12
Geras v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) 14
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 4
Gomez v. *United States*, 490 U.S. 858 (1989) 6
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 7, 8
Heckers v. *Fowler*, 69 U.S. (2 Wall.) 123 (1864) 16, 17
INS v. *Chadha*, 462 U.S. 919 (1983) 5
Katchen v. *Landy*, 382 U.S. 323 (1966) 18
Langenkamp v. *Culp*, 498 U.S. 42 (1990) 18
Kimberly v. *Arms*, 129 U.S. 512 (1889) 16, 17
MacDonald v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932) 17, 18
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 3, 12, 13
Marshall v. *Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010), aff'd on other grounds, 131 S. Ct. 2594 (2011) 8, 10
McDonald v. *City of West Branch*, 466 U.S. 284 (1984) 16
Middleby Corp. v. *Hussmann Corp.*, 962 F.2d 614 (7th Cir. 1992) 13
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ..... *passim*
Ortiz v. *Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906 (7th Cir. 2011) 12

Cases—Continued:

Randall v. *Sorrell*, 548 U.S. 230 (2006) 22
Rodriguez v. *United States*, 480 U.S. 522 (1987) 22
Roell v. *Withrow*, 538 U.S. 580 (2003) 6, 11, 19
SEC v. *Phan*, 500 F.3d 895 (9th Cir. 2007) 15
Sigma Micro Corp. v. *Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775 (9th Cir. 2007) 7, 8
Stern v. *Marshall*, 131 S. Ct. 2594 (2011) ..... *passim*
Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) 7
TTOD Liquidation, Inc. v. *Lim (In re DOTT Acquisition, LLC)*, No. 12-12133, 2012 WL 3257882 (E.D. Mich. July 25, 2012) 15
United States v. *Raddatz*, 447 U.S. 667 (1980) 19
Webster v. *Fall*, 266 U.S. 507 (1925) 19
Weidhorn v. *Levy*, 253 U.S. 268 (1920) 17

Constitution, statutes and regulations:

U.S. Const.:
Art. III, § 1 ..... *passim*
Amend. VII 7

Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. 151 *et seq.*:
28 U.S.C. 157(b) ..... *passim*
28 U.S.C. 157(b)(1) 20, 21
28 U.S.C. 157(b)(2) 9, 21
28 U.S.C. 157(b)(2)(C) 8, 22

Constitution, statutes and regulations—Continued:

28 U.S.C. 157(b)(2)(H) 21, 22
28 U.S.C. 157(b)(5) 23
28 U.S.C. 157(c)(1) 18, 21
28 U.S.C. 157(c)(2) 6, 19
28 U.S.C. 157(d) 22
28 U.S.C. 158 12
28 U.S.C. 158(a) 12
28 U.S.C. 158(d)(1) 12
28 U.S.C. 158(d)(2) 23
Federal Arbitration Act, 9 U.S.C. 9-11 17
11 U.S.C. 544 21
11 U.S.C. 548 21
28 U.S.C. 636(b) 18
28 U.S.C. 636(c)(1) 19
28 U.S.C. 636(c)(2) 19
28 U.S.C. 1334(c)(2) 22

Miscellaneous:

130 Cong. Rec. 6045 (1984) 23
Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 Am. Bankr. L.J. 145 (2010) 23
Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to* Stern v. Marshall, 86 Am. Bankr. L.J. 55 (2012) 5, 9
The Federalist No. 64 (John Jay) (Clinton Rossiter ed. 1961) 13

Miscellaneous—Continued:

Fed. R. Bankr. P.:
7008 10
7012 10
Fed. R. Civ. P. 73(b) 19

In the Supreme Court of the United States

No. 12-1200

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. INDIVIDUAL LITIGANT CONSENT CANNOT CURE THE STRUCTURAL ARTICLE III VIOLATION IDENTIFIED IN *STERN*

Article III, § 1 not only preserves litigants' rights to impartial adjudication, "but also serves as 'an inseparable element of the constitutional system of checks and balances.'" *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986) (quoting *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). Article III "'both defines the power and protects the independence of the Judicial Branch.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608 (2011) (quoting *Northern Pipeline*, 458 U.S. at 58

(plurality opinion)). Entry of final judgment is the "most prototypical exercise of judicial power," and, in a suit "brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at 2609, 2615. By assigning that responsibility to non-Article III bankruptcy judges, Congress threatened the "integrity of the system of separated powers and the role of the Judiciary in that system." *Id.* at 2620. When this structural aspect of Article III is at stake, individual parties "cannot by consent cure the constitutional difficulty," because private litigants "cannot be expected to protect" Article III's structural limitations, which serve "institutional interests." *Schor*, 478 U.S. at 850-851.

Respondent does not even acknowledge *Stern*'s holding that Section 157(b) threatens the "integrity of the system of separated powers." 131 S. Ct. at 2620. Rather, respondent denies structural concerns are implicated because "Congress has not undertaken to 'emasculate' constitutional courts." Resp. Br. 37; see *id.* at 35-44 (omitting discussion of *Stern* in Argument I.E.). But this Court has never adopted "emasculation" as the threshold for threats to the Constitution's structural integrity. To the contrary, even "challenges that may seem innocuous at first blush" can constitute a "threat to the separation of powers" that must be resisted. *Stern*, 131 S. Ct. at 2620.

Respondent nonetheless argues that Section 157(b) does not implicate structural concerns to the extent that: (1) bankruptcy judges are subject to Article III judges' control; and (2) bankruptcy court adjudication is "consensual." Resp. Br. 35-44. But *Stern* rejected the former, and the latter would turn *Schor*'s admonition

that structural Article III violations cannot be waived into an empty tautology.

A. Vesting The Power To Enter Judgment Of The United States Outside Of Article III Courts Is A Structural Violation

As explained in Executive Benefits Insurance Agency's (EBIA) opening brief, Pet. Br. 17-19, even intra-branch violations can implicate the Constitution's structural separation of powers. See *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (dual for-cause limitation on President's ability to remove Executive Branch officials); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) (allocation of jurisdiction between Supreme Court and lower courts). In *Marbury*, Congress's grant to the Supreme Court of *more* authority (to hear original cases) than Article III contemplated was not on its face an "encroachment" on the Judicial Branch, and certainly not an "aggrandizement" of another Branch at the Judiciary's expense. The Court nonetheless recognized that if Congress could confer original jurisdiction that should be appellate, it could equally confer "appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original." *Marbury*, 5 U.S. (1 Cranch) at 174. Thus, Congress's disregard of the constitutional design carried an implicit threat to this Court's authority.

Likewise, *Stern* recognized that the putative help Congress offered to overburdened district courts—letting them cede their original jurisdiction to bankruptcy judges in favor of appellate jurisdiction—was an offer that had to be rejected. Because "the bankruptcy court itself exercises 'the essential attributes of judicial power,'" "it [did] not matter who appointed the bank-

ruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remain[ed]." 131 S. Ct. at 2619 (citation omitted) (quoting *Schor*, 478 U.S. at 851); see *Northern Pipeline*, 458 U.S. at 59 n.10 (plurality opinion) ("The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well[.]"). That the Judiciary might be complicit in this arrangement was of no moment. Cf. *Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous.").

Even if "inter-branch encroachment" were essential to make an Article III violation unwaivable, see Resp. Br. 36, Section 157(b) would qualify. Congress reserved *for itself* power over bankruptcy judges that the Constitution denies Congress over Article III judges. Congress retains the power to cut bankruptcy judges' pay, to remove them from office, and even to eliminate their positions. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion) (statute guaranteeing tenure and undiminished salary "was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III"). Moreover, Congress deprived the President and Senate of their constitutional roles in the appointment of federal judges. Congress, consistent with Article III, could have created a bankruptcy court system with precisely the same shape as at present—judges with specialized bankruptcy jurisdiction (and lower salaries) and district courts sitting as first-level appellate courts—as long as it gave those judges life tenure and salary protection, and allowed the President to appoint them with the Senate's advice and consent.

In fact, in the aftermath of *Northern Pipeline*, Congress considered making bankruptcy judges Article III judges, but ultimately rejected this solution. See Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to* Stern v. Marshall, 86 Am. Bankr. L.J. 55, 59 (2012).

Respondent and his amici complain that EBIA seeks to destroy the bankruptcy courts and eviscerate their "efficiency." But the only "efficiency" served by the present system, in contrast to an Article III-compliant one, is evasion of the President's and Senate's constitutional roles, and the constitutional guarantees of tenure and salary. The Framers adopted these "inefficiencies" as essential to the system of checks and balances, and they may not be waived by the President, the Senate, or individual litigants. See *INS* v. *Chadha*, 462 U.S. 919, 958-959 (1983) ("[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.").

B. "Consent" In An Individual Case Does Not Cure A *Stern* Structural Violation

Schor recognized that, "[t]o the extent [Article III's] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." 478 U.S. at 850-851. Respondent argues that *Schor*'s "structural principle" is not implicated here because of the "consensual nature" of bankruptcy court adjudication. Resp. Br. 43. But if the "structural" inquiry turns on ad-hoc litigant consent, *Schor*'s limitation on the role of consent becomes a futile tautology.

The only way to avoid the tautology while giving consent some role in the structural inquiry (if any is

appropriate) is to require that consent be an express limitation on the authority of the non-Article III adjudicator. See Pet. Br. 28-36. For example, under the Magistrates Act or Section 157(c)(2), litigants are "made aware of the need for consent and the right to refuse it," *Roell* v. *Withrow*, 538 U.S. 580, 590 (2003), and the absence of advance consent is a jurisdictional defect that can be policed on appeal, see *Gomez* v. *United States*, 490 U.S. 858, 870-871 (1989); *Roell*, 538 U.S. at 597-598 (Thomas, J., dissenting).

None of those protections exist in Section 157(b), which simply assigned respondent's fraudulent conveyance claim against EBIA to a bankruptcy judge for final adjudication.[1]

C. Even If Consent In An Individual Case Were Sufficient, It Would Have To Be Knowing And Voluntary Consent, Which Could Not Exist Here

Respondent's fanciful assertion that "there is no serious argument that EBIA did not consent to proceeding in bankruptcy court on summary judgment," Resp. Br. 43, demonstrates, like the court of appeals' decision below, that "consent" offers scant protection if

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[1] Respondent asserts that the absence of consent was critical to *Stern*'s analysis of the Article III issue, and that the presence of supposed consent here therefore compels a different result. Resp. Br. 29-33. But the undisputed absence of consent in *Stern* simply means that the issue presented here was not decided in *Stern*. Moreover, to the extent *Stern* discussed the role of consent, it was to emphasize that creditors have "no choice" where to litigate their claims against the bankruptcy estate. See *Stern*, 131 S. Ct. at 2615 n.8. Likewise, Section 157(b) and controlling precedent gave EBIA "no choice" but to defend itself in the bankruptcy court.

courts can infer it post hoc from conduct that is, at best, ambiguous, while controlling precedent told the party it had no choice.

1. Respondent first purports to derive EBIA's consent from the fact that EBIA did not object to a joint status report that EBIA refused to sign, which reported that respondent would seek summary judgment against EBIA in bankruptcy court. Resp. Br. 60; Pet. App. 74a, 76a. But respondent ignores binding circuit authority that informed EBIA it had no right to Article III adjudication at summary judgment.

Even after this Court's decisions in *Northern Pipeline*, *Schor*, and *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Ninth Circuit held in *Duck* v. *Munn (In re Mankin)* that there was no Article III right to proceed before the district court on fraudulent conveyance claims. 823 F.2d 1296, 1301-1311 (1987), cert. denied, 485 U.S. 1006 (1988), overruled by Pet. App. 15a. Stressing the control Article III courts have through appointing bankruptcy judges, the Ninth Circuit concluded that Article III was satisfied. *Id.* at 1309-1310.

Two years after *Mankin*, this Court held in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), that there is a right to a jury trial in fraudulent conveyance actions against non-creditors. But the Court limited its decision to Seventh Amendment jury rights without reaching broader Article III issues. *Id.* at 50. And in *Sigma Micro Corp.* v. *Healthcentral.com (In re Healthcentral.com)*, the Ninth Circuit expressly held that *Granfinanciera* did not entitle a defendant to Article III adjudication of pre-trial summary judgment motions, 504 F.3d 775, 786-787 (2007).

Respondent faults EBIA for failing to anticipate *Stern*'s holding on the basis of *Granfinanciera* and *Northern Pipeline*, Br. 60-63, but respondent does not even acknowledge *Healthcentral.com*, which rejected the reading of *Granfinanciera* respondent contends was foreordained.[2] In this very case, the court of appeals acknowledged that bankruptcy-court entry of final judgment in fraudulent conveyance actions "was routine and uncontroversial" prior to *Stern*, Pet. App. 9a (citing *Mankin, supra*), but that "following [*Stern*] the view that such judgments are consistent with the Constitution is no longer tenable." *Ibid.*; *id.* at 15a, 23a (overruling *Mankin, supra*).[3]

Neither respondent nor any of his learned amici claim to have foreseen that *Granfinanciera* rendered unconstitutional bankruptcy court adjudication of

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[2] EBIA acknowledged *Healthcentral.com* in the bankruptcy court, conceding that court "retain[ed] jurisdiction over pretrial proceedings," Pet. App. 79a. Only one of respondent's amici mentions *Healthcentral.com*, Richard Aaron et al. Amicus Br. 15-16, erroneously asserting that the *Healthcentral.com* appellant raised no Article III objection. To the contrary, "the central issue" was that "bankruptcy courts did not have jurisdiction" because "pretrial proceedings in suits which properly belong before an Article III court may not be conducted by non-Article III courts." Appellant's Br. 2, 9, *Healthcentral.com, supra* (No. 04-17565).

[3] Nor would the Ninth Circuit's decision in *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011), have alerted EBIA to a new Article III argument. That decision held, as a matter of statutory interpretation, that Section 157(b)(2)(C) did not include a state-law counterclaim because it was not "core," *id.* at 1055-1061. But the decision did not disturb *Mankin*'s or *Healthcentral.com*'s constitutional holdings. See Pet. Br. 45-46.

fraudulent conveyance or other "core" claims. To the contrary, bankruptcy scholars were collectively "shock[ed]" by *Stern*. Block-Lieb, 86 Am. Bankr. L.J. at 57-58. As one of respondent's own amici explained, *Stern* was regarded as "the result of yet another shift in the Court's Article III jurisprudence." *Ibid.* Rather than predicting *Stern*'s outcome, "[c]ommentators predicted that the Court would overrule *Northern Pipeline*." *Ibid.*

2. In a final effort to manufacture EBIA's "consent," respondent argues for the first time that EBIA's alleged "pugnacious strategy of insisting that Arkison's fraudulent conveyance claim was non-core" demonstrates that EBIA made a "tactical decision to take its summary judgment chances in bankruptcy court." Resp. Br. 61-63. That is demonstrably not so.

To begin, respondent's characterization of EBIA's Answer is inaccurate. EBIA never "insist[ed] that Arkison's fraudulent conveyance claim was non-core." The Trustee's Complaint alleged that the proceeding was "an action to recover estate property" pursuant to nine causes of action against EBIA, including preferential transfers, fraudulent transfers, conversion, and breach of fiduciary duty, and that "thus" the action "is a 'core proceeding' pursuant to" specified subparagraphs of Section 157(b)(2). J.A. 50, ¶ 2.1. EBIA's Answer responded: "*Paragraph 2.1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.*" J.A. 80 (emphasis added). The Complaint's (implicit) assertion that fraudulent conveyance actions are "core" proceedings was a "legal conclusion" to which EBIA did not respond. EBIA did, however, dispute non-legal

assertions, such as that the property at issue was "estate property."[4]

Respondent's attempt to infer consent from EBIA's failure to specify whether a given claim was "core" or "non-core" is, moreover, directly contrary to the Bankruptcy Rules, which forbid inferring consent from a mere failure to respond. "A final order of judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties expressly consent." Fed. R. Bankr. P. 7012 (1987 advisory committee note); Fed. R. Bankr. P. 7008 (1987 advisory committee note) ("[F]ailure to include the statement of consent does not constitute consent.").

Even on its own terms, respondent's hypothesis strains credulity. It assumes that when EBIA filed its Answer, more than 18 months before the Ninth Circuit decided *Marshall*, EBIA: (1) anticipated *Stern*'s constitutional holding; (2) concluded that the solution to the as-yet unrecognized constitutional violation would be to recharacterize fraudulent conveyances as "non-core" (despite the statutory text); (3) recognized that EBIA would then have a right to an Article III court, but

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[4] To the extent that, contrary to what EBIA said, EBIA can be deemed to have "denied" the legal conclusion that the action was a "core proceeding," it would be more logical to infer that it was disputing the Trustee's incorrect (implied) assertion that all nine of the claims against EBIA were core. The breach of fiduciary duty claim, for example, was not core. See J.A. 75-76; *Diamond Mortg. Corp.* v. *Sugar*, 913 F.2d 1233 (7th Cir. 1990), cert. denied, 498 U.S. 1089 (1991). (That the fiduciary duty claim was not "core" is otherwise irrelevant here, because the claim was not the subject of the Trustee's summary judgment motion. See J.A. 125.)

could consent to bankruptcy adjudication; and (4) chose not to request Article III adjudication of dispositive pre-trial motions while simultaneously insisting on jury trial in district court. Pet. App. 77a-80a. If so implausible a string of conjecture were sufficient to demonstrate a party's "consent" to non-Article III adjudication, then a "consent" requirement is no practical limit at all.

II. APPELLATE REVIEW CANNOT CURE THE ABSENCE OF A VALID ARTICLE III JUDGMENT

Because the bankruptcy court "lacked the constitutional authority" to enter judgment, *Stern* v. *Marshall*, 131 S. Ct. 2594, 2601 (2011), no valid judgment has been entered. Absence of authority to enter judgment "means absence of a 'judgment,'" which in turn "destroys jurisdiction of a court * * * reviewing" that judgment. *Roell* v. *Withrow*, 538 U.S. 580, 597-598 (2003) (Thomas, J., dissenting); see also, *e.g.*, *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 144 (1947) (two judges instead of statutorily-required three rendered judgment "void and without statutory authority," leaving "no alternative but to vacate the judgment and dismiss the appeal"); Pet. Br. 37. Proceedings of a court without jurisdiction are *coram non judice*, "'before a person not a judge'"; "the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present and could therefore not yield a *judgment*." *Burnham* v. *Sup. Ct. of Cal.*, 495 U.S. 604, 608-609 (1990) (plurality opinion); see also *Freytag* v. *Comm'r Internal Revenue*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("a jurisdictional defect deprives not only the initial court but also the appellate court of its power

over the case"); *id.* at 897-898 (equating the structural defect in *Schor* with subject matter jurisdiction).

Here, the district court exercised appellate jurisdiction over the bankruptcy court's invalid "final judgment." Pet. App. 51a; J.A. 188; 28 U.S.C. 158. But, lacking a valid original "final judgment" of an Article III court, the district court and court of appeals lacked appellate jurisdiction, and their decisions below must be vacated "for want of jurisdiction." See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981) (appellate decision vacated because "finality requirement embodied in § 1291 is jurisdictional"); *Ortiz* v. *Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906, 915 (7th Cir. 2011) ("Unless and until an Article III judge enters a final judgment, we have no jurisdiction to review these matters.").[5]

Appellate review by the district court (and court of appeals) is no substitute for an Article III tribunal's exercise of original jurisdiction. This Court has long recognized that "the essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison*, 5 U.S. (1 Cranch)

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[5] The United States suggests that, under *Stern*, the defect in the bankruptcy court's judgment was not jurisdictional. U.S. Br. 16-17 (citing 131 S. Ct. at 2607). But *Stern*'s statements on jurisdiction concern Subsection 157(b)(5), which governs only where a tort claim "shall be tried." *Stern* did not address either Section 158(a) (providing district courts with "jurisdiction to hear appeals" of "final judgments" by bankruptcy courts on core matters), or Section 158(d)(1) (giving courts of appeals "jurisdiction" over appeals from district courts' appellate rulings). Without a "final judgment" of a court with constitutional authority, the lower courts here lacked appellate jurisdiction.

137, 175-176 (1803). An appellate court "may not create jurisdiction by entering judgments on behalf of the district courts and then reviewing those judgments." *Middleby Corp.* v. *Hussmann Corp.*, 962 F.2d 614, 616 (7th Cir. 1992).

Respondent suggests that the district court's *appellate* review "renders constitutionally irrelevant" any injury suffered by EBIA, Resp. Br. 54, but respondent fails to account for the absence of a constitutionally valid judgment. Judgments of the United States are an expression of the co-equal power of the Judicial Branch. See The Federalist No. 64, at 394 (John Jay) (Clinton Rossiter ed. 1961) ("[T]he judgments of our courts * * * are as valid and as binding on all persons whom they concern, as the laws passed by our legislature."). Here, it was the judgment *of the non-Article III bankruptcy court* that imposed an obligation upon EBIA to pay the money judgment, triggered accrual of post-judgment interest, and was the basis for garnishment to enforce that judgment. J.A. 189-205.[6]

The district court's subsequent appellate review—even if de novo—could not cure the absence of a valid judgment having been entered. *Marbury*'s recognition that appellate review "revises and corrects" the original decision, "and does not create the cause," 5 U.S. (1 Cranch) at 175-176, is not merely a statement of legal

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[6] Indeed, in respondent's only example of a district court's de novo review purportedly remedying the absence of a valid judgment, *Estate of Conners* v. *O'Connor*, 6 F.3d 656 (9th Cir. 1993), cert. denied, 510 U.S. 1045 (1994), see Resp. Br. 55, the district court conducted its own review of a magistrate's attorneys' fees award, reduced it, and *entered its own judgment*, from which the circuit appeal was taken, 6 F.3d at 658-660.

principle, but a recognition of practical reality. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982) (plurality opinion) (noting that an appellate court is restricted to "the case as it has been shaped at the trial level"); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1051 (7th Cir. 1984) (Posner, J., dissenting) (observing that, although a magistrate judge ruling would not "have the last word," "his decision, and the record he had shaped on which [his] decision rested, might influence the decision of the reviewing court"). Indeed, the record contains strong indications that the bankruptcy court's actions affected the district court's review as an appellate tribunal. See, *e.g.*, Pet. App. 50a-51a (invoking deferential "substantial evidence" standard, citing the "weight of the evidence," and stating that EBIA, the nonmovant, "had done nothing to show any defect" in the bankruptcy court's ruling).

This Court need not—and should not—pass on the underlying summary judgment merits. But respondent mischaracterizes the record in suggesting that "overwhelming evidence" renders the issues before this Court academic. Resp. Br. 57. Had EBIA received an initial determination by an Article III court, summary judgment likely would not have been granted.[7] The

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[7] Respondent also falsely asserts in passing that the Trustee's successor liability claim "renders moot any error on the fraudulent conveyance claim." Resp. Br. 56 n.10. It suffices to note that respondent's successor liability claim was for less than a third of the total judgment, and thus the award on successor liability is insufficient to sustain the bankruptcy court's full judgment. See J.A. 137 (summary judgment memorandum seeking $117,286.84 in outstanding debts under successor liability, or $373,291.28 for assets fraudulently transferred); Pet. App. 54a (principal judgment

Trustee's evidence of fraudulent transfers consisted principally of a single page printed from QuickBooks accounting software as interpreted by the bankruptcy estate's accountant. J.A. 139-142. This evidence was pitted against Nicholas Paleveda's declaration explaining that the inter-company transactions were not fraudulent because they reflected commissions from new business developed after EBIA's formation. See J.A. 174, 177-178.[3] The bankruptcy court did not "trust Mr. Paleveda's testimony," J.A. 185, and the district court dismissed it as "self-serving," Pet. App. 49a. Yet the conflicting factual assertions should have been sufficient to defeat summary judgment. See, *e.g.*, *SEC* v. *Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (ordinarily, "[t]hat an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact").

The Constitution guarantees EBIA an initial adjudication by an Article III court—not appellate review retroactively deemed original. In any event, the absence of a valid initial judgment destroyed the basis for appellate jurisdiction, foreclosing review until an Article III court exercises original jurisdiction.

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amount of $373,291.28). In any event, the successor liability claim is likely also governed by *Stern*. See *TTOD Liquidation, Inc.* v. *Lim (In re DOTT Acquisition, LLC)*, No. 12-12133, 2012 WL 3257882, at *3 (E.D. Mich. July 25, 2012).

[3] In particular, the QuickBooks print-out showed $250,157 in disputed deposits after May 1, 2006. J.A. 142; Pet. App. 7a n.2. Paleveda's declaration explained that EBIA began earning commissions on new business by then. J.A. 162-164.

III. VINDICATING ARTICLE III IN THIS CASE DOES NOT REQUIRE THE COURT TO OVERTURN PRECEDENT OR OTHER STATUTORY SCHEMES

Contrary to respondent's suggestion, vindicating Article III here would not require overturning established precedent or other statutory schemes.

A. Respondent's Historical Authorities Are Inapposite

Respondent's focus on certain 19th-century decisions, see Br. 23-24, ignores the constitutional significance of entry of final judgment of the United States, see *Stern* v. *Marshall*, 131 S. Ct. 2594, 2615 (2011). In both *Kimberly* v. *Arms*, 129 U.S. 512 (1889), and *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123 (1864), a court entered the enforceable final judgment. Thus, neither holds that a private party (or official who is not an Article III judge) may, on consent of the parties, enter final judgment of the United States.

In *Kimberly*, the special master (to whom the dispute was referred by express written agreement) submitted his report to the court, recommending an award for plaintiff. The court, upon review, disagreed and entered judgment for defendant. Drawing an analogy to arbitration agreements, this Court held that the trial court's failure to defer to the master's findings "disregard[ed] the express stipulation of the parties." 129 U.S. at 524-525.[9] The Court remanded "with direction

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[9] Today, post-*Erie*, the case would likely be decided under the Federal Arbitration Act. Private arbitrations do not offend Article III because "arbitration is not a judicial proceeding," *McDonald* v. *City of West Branch*, 466 U.S. 284, 288 (1984), and the court,

to confirm the report of the special master," *id.* at 530, *i.e.*, to enter a new final judgment. There was no question of the special master entering final judgment.

In *Heckers*, the case was referred by the parties' written consent, and "judgment was rendered" in the trial court "upon the report of the referee," to which "the losing party made no objections." 69 U.S. (2 Wall.) at 126, 127, 133. Before this Court, the appellant did *argue* the judgment had been improperly entered by the clerk, rather than the court, cf. Resp. Br. 24, but this Court rejected that characterization as without record support. 69 U.S. (2 Wall.) at 132. The Court observed that "[j]udgments are always entered by the clerk" but "under the authority of the court," and that, even without a minute order so directing, "no one ever doubted that a judgment entered under such circumstances was the act of the court and not of the clerk." *Ibid.* Here, in any event, there is no question that a non-Article III bankruptcy judge entered "judgment." Pet. App. 54a.

Respondent's early bankruptcy cases are likewise inapposite. His historical account omits that fraudulent conveyance actions were "plenary," and referees lacked authority to decide them. *Weidhorn* v. *Levy*, 253 U.S. 268, 274 (1920). Contrary to the suggestion of some amici, American College of Bankruptcy Amicus Br. 13, *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), did not implicitly hold that Article III structural violations could be waived by consent. It decided only whether, as a statutory matter, a plenary prefer-

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which enters judgment, merely effectuates the parties' contractual agreement, see 9 U.S.C. 9-11.

ence action to be conducted in district court could be submitted to a referee, and even then only on express agreement as opposed to after-the-fact inferred consent or waiver. *Id.* at 265, 267 (noting this was the "only question presented"); U.S. Br. 19 n.5 (acknowledging only "litigant's waiver of a *statutory* right" was presented).

Nor does this case implicate bankruptcy-court resolution of issues "integral to the claims determination process." *Stern*, 131 S. Ct. at 2617 (quoting *Langenkamp* v. *Culp*, 498 U.S. 42, 44 (1990) (per curiam)). This Court has only addressed that possible exception to Article III in the narrow context of preference actions, where the claims allowance process may necessarily "decide whether there had been a voidable preference." *Id.* at 2616 (discussing *Katchen* v. *Landy*, 382 U.S. 323 (1966)). Petitioner does not challenge that bankruptcy courts can resolve "the restructuring of debtor-creditor relations" that the Court has assumed may be "public rights." See *id.* at 2614 n.7 (quoting *Granfinanciera*, 492 U.S. at 56 n.11).

B. Finding A Structural Violation Here Does Not Require Invalidating Other Statutes

Contrary to respondent's hyperbole, ruling for EBIA does not require "invalidating the entire magistrate judge system." Resp. Br. 45. Magistrates' authority under 28 U.S.C. 636(b) to rule on non-dispositive pre-trial matters or make proposed findings is simply not implicated here. Cf. *Stern*, 131 S. Ct. at 2618-2619 (discussing characteristics of "adjuncts"). The current authority of bankruptcy judges is significantly greater than magistrate judges. Compare 28 U.S.C. 157(b) (entry of judgment) and 157(c)(1) (report

and recommendation even for final evidentiary hearings) with *United States* v. *Raddatz*, 447 U.S. 667, 679-684 (1980) (Section 636(b) did not confer authority for either final decision of major pretrial matters or report and recommendation on final merits hearing).

Nor need the Court decide whether the magistrates or bankruptcy statutes incorporating consent as a jurisdictional limit on entry of final judgment violate Article III. See 28 U.S.C. 636(c)(1); 28 U.S.C. 157(c)(2); Pet. Br. 28-36.[10] Unlike those statutes, under Section 157(b), EBIA "had nowhere else to go" to defend the Trustee's fraudulent conveyance action. *Stern*, 131 S. Ct. at 2614.

In any event, the Court has never held that Article III permits private parties to consent to entry of a final judgment of the United States by someone not an Article III judge. *Roell*, 538 U.S. 580, was decided on statutory, not constitutional, grounds. See Pet. Br. 32 n.4; contra Resp. Br. 26-27. The sole question was the standard for consent under Section 636(c), because respondent asserted no structural Article III violation. See Resp. Br. at 28, *Roell*, *supra* (No. 02-69) (arguing that individuals "can choose to forego their personal right to an Article III judge," but that no valid consent occurred); *Webster* v. *Fall*, 266 U.S. 507, 511 (192[illegible]) ("Questions which merely lurk in the record, neither

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[10] One factor in such an inquiry would be whether the process for consensual referral preserves "the confidentiality of a party's choice," as the Magistrates Act does by requiring the clerk of court to handle consent questions, "protecting an objecting party against any possible prejudice at the * * * judge's hands later on." *Roell* v. *Withrow*, 538 U.S. 580, 586 (2003); see also 28 U.S.C. 636(c)(2); Fed. R. Civ. P. 73(b). No analogous protection exists in bankruptcy.

brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

IV. Bankruptcy Judges Lack Statutory Authority To Issue Proposed Findings And Conclusions In Core Proceedings

Stern created a statutory gap in the bankruptcy court's authority under Section 157. Respondent and his amici propose various "solutions" that amount to asking this Court to cure one separation-of-powers violation with another, by rewriting Congress's statute. The constitutional defect in Section 157(b) is not susceptible to simple severance.

First, the statute does *not* grant bankruptcy judges authority to issue proposed findings of fact and conclusions of law in core proceedings like fraudulent conveyances. The "manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2603 (2011). In core proceedings, bankruptcy judges enter final judgment, subject to appellate review; in non-core proceedings, the bankruptcy judge submits proposed findings and conclusions, and the district court enters final judgment. *Id.* at 2604-2605. Section 157(b)(1) provides only one mechanism for district courts to act upon core proceedings that have been referred: appellate review under Section 158.

Respondent suggests the word "may" in Section 157(b)(1) makes entry of judgment by bankruptcy courts permissive. Resp. Br. 66. However, "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc.* v. *Bill Harbert*

Const. Co., 529 U.S. 193, 198 (2000). Section 157(b) provides a quintessential example; the disjunctive treatment of core and non-core proceedings (with the bankruptcy court and district court, respectively, authorized to enter judgment and no reference to proposed findings in core proceedings) demonstrate that the word "may" is a grant of *authority* to enter judgment, not *discretion* to enter judgment.

Respondent also suggests partial referral and then withdrawal of *Stern*-governed core claims, leaving the district court to review a report and recommendation. Resp. Br. 66-67. No such procedure occurred here, and recharacterizing the district court's appellate ruling cannot cure the absence of a valid final judgment. See pp. 11-16, *supra*. Furthermore, Section 157(b) does not set forth a process or standard of review for non-final reports, as Section 157(c)(1) does. Thus, this proposed "solution" raises more questions than it answers. Which interlocutory orders would be deemed "rulings" and which only recommendations (and reviewed under what standard)? Respondent's a-textual "solution" (and the litigation over scope and standards of review it would entail) would reduce, rather than improve, efficiency.

Second, no judicial pen stroke can turn fraudulent conveyance claims into non-core proceedings. Like the counterclaims in *Stern*, fraudulent conveyance claims are expressly core under the definition in Section 157(b)(1). They "aris[e] under title 11"—specifically, under Sections 544 and 548. They would remain core if Section 157(b)(2)(H) (or all of (b)(2)) were severed. Amici are thus forced to propose that fraudulent conveyances are an "exception" to the rule that all proceedings that "arise under title 11" are core. Brown et

al. Amicus Br. 15-16. *Stern* forecloses such judicial redrafting. 131 S. Ct. at 2605; see also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (cautioning against "blue-pencil[ing]" statute because "such editorial freedom * * * belongs to the Legislature, not the Judiciary"); *Randall* v. *Sorrell*, 548 U.S. 230, 262 (2006) (declining to sever where Court would "write words into the statute" or choose "which of the many different possible ways" the legislature might respond).

Moreover, "severing" as proposed would have collateral consequences for other provisions. If fraudulent conveyance claims (or other *Stern* claims defined as "core") are recharacterized as non-core, then, to the extent they arise under state law, they would be subject to mandatory abstention. See 28 U.S.C. 1334(c)(2); 28 U.S.C. 157(b)(2)(C) (state-law counterclaims); 28 U.S.C. 157(b)(2)(H) (Section 544(b) avoidances based on state law). Respondent's "severance" would thus rewrite critical features of the jurisdictional framework unrelated to the constitutional defect identified in *Stern*, including those reflecting federalism concerns.

Respondent and amici nonetheless plea for the Court to do "the only logical thing," Resp. Br. 64, and allow bankruptcy courts to enter final judgment to the extent of their constitutional authority and otherwise make proposed findings and conclusions. Though they assert this was Congress's intent, to the contrary, Section 157 did not uniformly seek to maximize bankruptcy court authority. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). Section 157(d) requires district

court determination of any matter involving "consideration of both title 11 and laws of the United States regulating organizations or activities affecting interstate commerce." Congress similarly provided for district court trial of certain tort claims. 28 U.S.C. 157(b)(5). And Congress recognizes the *in*efficiencies of multilayer review, as evidenced by 2005 amendments allowing some direct court of appeals review of bankruptcy court decisions. 28 U.S.C. 158(d)(2); Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 Am. Bankr. L.J. 145, 147 (2010). These are hallmarks of a Congressional scheme allocating authority in highly nuanced ways, reflecting competing policy concerns the Court cannot resolve.

With the Bankruptcy Act of 1984, Congress expected that 95% of cases would not "require involvement by an article III judge." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). Following *Stern*, this is no longer true. There are many options for a constitutionally-compliant bankruptcy system: redrawing the line between core and non-core claims; placing *Stern*-governed matters entirely in district courts, with magistrate assistance; making bankruptcy judges magistrates for such matters; or establishing a new tier of Article III judges. Congress's overreach in Section 157(b) cannot, however, be corrected by an overreach in the opposite direction. Given the array of available options, it is for Congress to revise the statute.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be vacated.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
PETITIONER

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE
ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether litigation conduct reflecting an implied consent to the entry of final judgment by a bankruptcy judge may waive the right to have certain fraudulent-conveyance claims adjudicated only by an Article III court.

2. Whether a bankruptcy judge has statutory authority to issue proposed findings of fact and conclusions of law, subject to a district court's *de novo* review, regarding a fraudulent-conveyance claim filed by the estate against a noncreditor.

TABLE OF CONTENTS

Page

Interest of the United States 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 11
Argument 13
I. The right to have certain fraudulent-conveyance actions adjudicated by an Article III judge may be waived by the parties' express or implied consent to adjudication by a bankruptcy judge 13
A. In the context of a bankruptcy proceeding, the right to a final adjudication by an Article III judge is a waivable personal interest 15
1. The division of tasks between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction, which is vested in the district court 16
2. In bankruptcy and similar contexts, the Court has repeatedly relied on a timely objection to trigger enforcement of a party's right to an Article III decisionmaker 18
3. Bankruptcy-judge adjudications do not raise sufficient separation-of-powers concerns to render the Article III right nonwaivable 22
B. Consent to bankruptcy-judge adjudication may be inferred from litigation conduct 23
C. Even if this Court holds that petitioner's litigation conduct did not amount to constitutionally valid consent to bankruptcy-judge resolution of respondent's fraudulent-conveyance claim, petitioner is not entitled to vacatur of the judgment below 26

Table of Contents—Continued: Page

II. A bankruptcy judge who cannot constitutionally enter final judgment may make proposed findings of fact and conclusions of law that will be subject to the district court's *de novo* review.....29
A. The statutory text does not preclude the use of proposed findings of fact and conclusions of law in these circumstances.....29
B. Where the Constitution forbids bankruptcy courts from using the procedures applicable to core proceedings, principles of severability warrant the use of the procedures that apply to non-core proceedings.....30
Conclusion.....33
Appendix A — Statutory provisions.....1a
Appendix B — Local rules and orders.....15a

TABLE OF AUTHORITIES

Cases:

Ayotte v. *Planned Parenthood*, 546 U.S. 320 (2006).....32
Brady v. *United States*, 397 U.S. 742 (1970).....26
Buckley v. *Valeo*, 424 U.S. 1 (1976).....23
Capron v. *Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).....16
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986).....9, 15, 16, 18, 22, 23
Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).....31, 32
Freytag v. *Commissioner*, 501 U.S. 868 (1991).....27
Granfinanciera v. *Nordberg*, 492 U.S. 33 (1989).....4, 12, 13
Henderson ex rel. Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011).....16
Katchen v. *Landy*, 382 U.S. 323 (1966).....14
Langenkamp v. *Culp*, 498 U.S. 42 (1990).....14

Cases: Page

MacDonald v. *Plymouth Cnty. Trust Co.*, 286 U.S. 263 (1932) 19
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 16
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 2, 3, 18, 19
Pacemaker Diagnostic Clinic of Am., Inc. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S. 824 (1984) 18, 21
Parco Merged Media Corp., In re, 489 B.R. 323 (D. Me. 2013) 32
Peretz v. *United States*, 501 U.S. 923 (1991) 17
Roell v. *Withrow*, 538 U.S. 580 (2003) 10, 20, 21, 23, 24
Securities Investor Prot. Corp. v. *Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46 (S.D.N.Y. 2013) 32
Stern v. *Marshall*, 131 S. Ct. 2594 (2011) ..... *passim*
Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) 3, 18
United States v. *Olano*, 507 U.S. 725 (1993) 26, 27, 28
United States v. *Mezzanatto*, 513 U.S. 196 (1995) 23
Yakus v. *United States*, 321 U.S. 414 (1944) 26

Constitution, statutes, and rule:

U.S. Const.:
Art. III ..... *passim*
§ 1 .....
§ 2, Cl. 1 16
Amend. VII 13
Act of July 1, 1898, ch. 541, §§ 34-39, 30 Stat. 555-556 19
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 3

Statutes, and rule—Continued: Page

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 2
Federal Magistrates Act, 28 U.S.C. 631 *et seq.* 20
28 U.S.C. 631(e) 20
28 U.S.C. 636(c)(1) 10, 20
11 U.S.C. 307 1
11 U.S.C. 548(a)(2) 7
28 U.S.C. 152 (Supp. IV 1980) 2
28 U.S.C. 152(a)(1) 2, 23
28 U.S.C. 152(e) 2, 23
28 U.S.C. 157 ..... 4, 8, 16
28 U.S.C. 157(a) 3, 17
28 U.S.C. 157(b) 17
28 U.S.C. 157(b)(1) 3, 12, 14, 29, 30
28 U.S.C. 157(b)(2) 3, 5
28 U.S.C. 157(b)(2)(C) 4
28 U.S.C. 157(b)(2)(H) 3, 8, 14, 24
28 U.S.C. 157(b)(3) 30
28 U.S.C. 157(b)(4) 3
28 U.S.C. 157(c)(1) 4, 24, 29, 31
28 U.S.C. 157(c)(2) 2, 4, 17, 24
28 U.S.C. 157(d) 3, 17
28 U.S.C. 158 (2006 & Supp. V 2011) 3, 23
28 U.S.C. 158(a)(1) 17
28 U.S.C. 158(c)(2) 17
28 U.S.C. 530D 8
28 U.S.C. 581-589a (2006 & Supp. V 2011) 1
28 U.S.C. 1334(a) 3, 17
28 U.S.C. 1334(b) 3, 17
42 U.S.C. 1983 20

Rule—Continued: Page

Fed. R. Bankr. P. 7012(b) 5, 27

Miscellaneous: Page

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In the Supreme Court of the United States

No. 12-1200

EXECUTIVE BENEFITS INSURANCE AGENCY,
PETITIONER

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE
ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this case because the Court's decision is likely to affect the allocation of authority between bankruptcy and district courts in the disposition of bankruptcy cases. That interest arises in part because United States Trustees—who are Department of Justice officials appointed by the Attorney General—are charged with supervising the administration of bankruptcy cases. See 28 U.S.C. 581-589a; see also 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any [bankruptcy] case or proceeding"). In addition, Congress has provided that, even in non-core proceedings, a bankruptcy judge may enter final judgment

"with the consent of all the parties to the proceeding." 28 U.S.C. 157(c)(2). The constitutionality of that provision depends on whether litigant consent can authorize a bankruptcy judge's exercise of powers that would otherwise be reserved for an Article III decisionmaker.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. Since the enactment of the Bankruptcy Reform Act of 1978 (1978 Act), Pub. L. No. 95-598, 92 Stat. 2549, bankruptcy judges have been appointed to serve 14-year terms. See 28 U.S.C. 152(a)(1); 28 U.S.C. 152 (Supp. IV 1980). Bankruptcy judges therefore are not Article III judges, although they are "judicial officers of the United States district court," are appointed by the courts of appeals, and are removable for cause only by judicial councils. 28 U.S.C. 152(a)(1) and (e).

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court invalidated aspects of the 1978 Act that vested in bankruptcy judges the power to enter final judgments in "a wide variety of

cases involving claims that may affect the property of the [bankruptcy] estate." *Id.* at 54 (plurality opinion). Because it did not produce a majority opinion, *Northern Pipeline* "establishe[d] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985).

Congress responded to *Northern Pipeline* by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), Pub. L. No. 98-353, 98 Stat. 333. The 1984 Act vests original (and sometimes exclusive) jurisdiction over all bankruptcy cases and related civil proceedings in federal district courts. 28 U.S.C. 1334(a) and (b). It provides, however, that a district court may refer such a case or proceeding to a bankruptcy judge in its district and may, at any time, withdraw such a reference "in whole or in part," either "on its own motion or on timely motion of any party." 28 U.S.C. 157(a) and (d).

In prescribing procedures for bankruptcy judges, the 1984 Act distinguishes between "[c]ore" and "[n]on-core" proceedings. 28 U.S.C. 157(b)(2) and (4). The definition of core proceedings includes, as relevant here, "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. 157(b)(2)(H). When the reference has not been withdrawn in a core proceeding, the bankruptcy judge may "enter appropriate orders and judgments," which are subject to appellate review in the district court. 28 U.S.C. 157(b)(1), 158 (2006 & Supp. V 2011). In a non-core proceeding, by contrast, the bankruptcy judge may exercise a similar authority only "with

the consent of all the parties to the proceeding." 28 U.S.C. 157(c)(2). Absent such consent, the bankruptcy judge may "hear" a non-core proceeding and "submit proposed findings of fact and conclusions of law to the district court," which may then enter "any final order or judgment" after "de novo" review in light of the parties' "timely and specific[] object[ions]." 28 U.S.C. 157(c)(1).

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the Court concluded that Section 157 grants too much authority to bankruptcy judges in at least some core proceedings. The 1984 Act identifies, as one category of "[c]ore proceedings," "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. 157(b)(2)(C). The Court in *Stern* held that, when a creditor has objected to bankruptcy-court adjudication of a debtor's counterclaim against it, the bankruptcy judge lacks authority under Article III to enter final judgment on the counterclaim if the counterclaim is founded on state law and its resolution would require factual and legal determinations that would not otherwise be made in the course of resolving objections to the creditor's proof of claim. *Id.* at 2608-2620. The Court relied in part on its prior decision in *Granfinanciera* v. *Nordberg*, 492 U.S. 33 (1989), which the *Stern* Court described as concluding that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." 131 S. Ct. at 2614 n.7. The Court explained that its "removal of [such] counterclaims * * * from core bankruptcy jurisdiction" would not "meaningfully change[] the [statutory] division of labor" between district and bankruptcy judges. *Id.* at 2620.

2. This case is an adversary proceeding arising out of the chapter 7 bankruptcy of Bellingham Insurance

Agency, Inc. Pet. App. 1a, 5a-6a. Respondent is the chapter 7 trustee, who sought to recover for the estate (as relevant here) transfers that Bellingham had made to petitioner when Bellingham was already insolvent. *Ibid.* Respondent's May 31, 2008, complaint in the bankruptcy court alleged that the transfers were fraudulent conveyances under federal and state law (J.A. 65-66, 70-71) and, in the alternative, that petitioner was liable for Bellingham's debts because petitioner was the mere continuation of Bellingham under a different name (J.A. 73). The complaint also alleged that the matter was a "core proceeding" under 28 U.S.C. 157(b)(2). J.A. 50 (¶ 2.1).

On August 2, 2008, petitioner filed its answer to the complaint. J.A. 79-94; Pet. App. 78a n.1. Federal Rule of Bankruptcy Procedure 7012(b) states that "[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core." Rule 7012(b) further provides that "[i]f the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge." With respect to paragraph 2.1 of respondent's complaint, which alleged that the proceeding was a core proceeding, petitioner's answer stated that "[t]o the extent that a response is required, [petitioner] denies." J.A. 80. Petitioner's answer also stated that petitioner "elect[ed]" for a jury trial "on all issues upon which it is entitled to a jury" and did not "consent to have said jury trial in [the Bankruptcy] Court." J.A. 94. Petitioner's answer did not otherwise specify, as Rule 7012(b) requires, whether petitioner did or did not "consent to entry of final orders or judgment by the bankruptcy judge."

In December 2009, after the case was calendared for trial by the bankruptcy judge, petitioner filed a motion to vacate the trial date, in which it asserted that it was entitled to a jury trial in the district court under *Granfinanciera*. Pet. App. 79a. Petitioner added that the Ninth Circuit had "further clarified that" the bankruptcy court's jurisdiction could continue during "pretrial proceedings." *Ibid.* The district court construed the motion as one to withdraw the reference to the bankruptcy court, and it requested a joint status report from the parties about remaining pretrial proceedings. J.A. 104. On March 12, 2010, all parties except petitioner signed a joint status report, which noted that respondent would file a motion for summary judgment against petitioner. Pet. App. 74a, 76a. Petitioner did not object or file a separate report. The district court issued an order noting that the parties "wish to have additional time to complete discovery, to file dispositive motions in the bankruptcy court, and to attend a settlement conference before a bankruptcy judge." *Id.* at 62a-63a. The district court therefore postponed until June 2010 a determination of whether to withdraw the reference to the bankruptcy court. *Id.* at 63a.

On March 17, 2010, respondent filed its promised motion for summary judgment in the bankruptcy court. J.A. 106-107. Petitioner filed its opposition on April 9, 2010, contending that relevant "factual claims" were "highly controverted," J.A. 144, but raising no argument against disposition of the motion by the bankruptcy judge, J.A. 143-168.

After a hearing, J.A. 181-185, the bankruptcy judge granted respondent's motion for summary judgment, holding both that petitioner's transfers to the debtor had been "fraudulent in nature" and that petitioner "is a

mere successor of the debtor," Pet. App. 56a-57a. On May 27, 2010, the bankruptcy court entered final judgment in the amount of $389,474.36, plus post-judgment interest. *Id.* at 54a-55a.

3. Petitioner appealed the entry of summary judgment to the district court, J.A. 186, which affirmed, Pet. App. 41a-52a. Conducting *de novo* review, the district court held that petitioner had "failed to show any dispute of material fact in the record that could possibly support the reversal of the Bankruptcy Court's order." *Id.* at 45a, 51a; see *id.* at 46a (no "dispute of fact" with respect to claim under 11 U.S.C. 548(a)(2)); *id.* at 49a (no "genuine issue of material fact" with respect to state-law fraudulent-transfer claim); *id.* at 50a ("no error in the Bankruptcy Court's conclusion" that petitioner was a "'mere continuation' of" the debtor).

4. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. J.A. 39. Shortly before its reply brief was due, petitioner filed a motion to dismiss for lack of jurisdiction. J.A. 41. In that motion, petitioner invoked this Court's then-recent decision in *Stern*, *supra*, and contended for the first time that the bankruptcy judge had been constitutionally proscribed from entering final judgment on respondent's fraudulent-conveyance claim. Pet. App. 7a-8a. The court of appeals invited briefs from amici curiae addressing whether bankruptcy judges may enter final judgments in fraudulent-conveyance actions and, if not, whether they could "hear the proceeding and submit a report to and recommendation to a federal district court." *Id.* at 8a n.3. In response to that invitation, the United States filed a brief contending that, in the absence of consent, a bankruptcy judge may not enter final judgment in a fraudulent-conveyance action brought against noncredi-

tors; that petitioner's litigation conduct nevertheless showed that it had waived any Article III objections to bankruptcy-judge adjudication here; and that, even apart from the question of consent, any constitutional harm had been cured by the district court's *de novo* review. Gov't C.A. Amicus Br. 12-14, 15-20, 20-22.[1]

5. The court of appeals affirmed. Pet. App. 1a-40a.

a. The court of appeals recognized that bankruptcy judges have statutory authority to enter final judgments in fraudulent-conveyance proceedings. Pet. App. 8a-9a. It held, however, that, in light of this Court's decisions in *Granfinanciera* and *Stern*, that statutory authorization is inconsistent with Article III when a fraudulent-conveyance claim is asserted against "noncreditors to the bankruptcy estate." *Id.* at 23a.

b. The court of appeals then turned to "a subsidiary question: whether bankruptcy judges may constitutionally hear such claims, and prepare recommendations for de novo review by the federal district courts." Pet. App. 23a. The court recognized that 28 U.S.C. 157 does not "explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding," though it grants them that power in non-core proceedings. Pet. App. 23a-24a. The court concluded, however, that bankruptcy courts are not "impotent to address fraudulent conveyance proceedings" because Congress intended to vest bankruptcy courts "with as much adjudicatory power as the Constitution

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[1] On the day the Department of Justice filed its brief in the court of appeals, the Attorney General informed Congress, in accordance with 28 U.S.C. 530D, of the Department's position that bankruptcy judges' authority under 28 U.S.C. 157(b)(2)(H) to issue final judgments in fraudulent-conveyance actions is unconstitutional in certain applications.

will bear." *Id.* at 24a. The court accordingly held that the statutory authority to "'hear and determine' a proceeding surely encompasses the power to hear the proceeding and submit proposed findings of fact and conclusions of law to the district court." *Ibid.* The court also noted that this Court in *Stern* had given tacit approval to the decision of the district court in that case to treat a bankruptcy court's judgment as "proposed[,] rather than final," and to review that decision *de novo*. *Id.* at 25a (quoting *Stern*, 131 S. Ct. at 2602) (alteration in original).

c. The court of appeals further concluded that, even when "defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable." Pet. App. 26a. The court found that "[t]he waivable nature of the allocation of adjudicative authority between bankruptcy courts and Article III courts is well established." *Id.* at 26a-27a. It noted, *inter alia*, this Court's explanation that "Article III, § 1's guarantee of an independent and impartial adjudication * * * serves to protect primarily personal, rather than structural, interests." *Id.* at 27a (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986)).

Turning to the facts of this case, the court of appeals held that petitioner's "conduct bore considerable indicia of consent." Pet. App. 29a. The court observed that, although petitioner had invoked its right to a jury trial in the district court, it had "elected not to pursue a hearing in an Article III court," and had instead "petitioned the district court to stay its consideration of the motion to withdraw the reference to give the bankruptcy court time to adjudicate [respondent's] motion for summary

judgment." *Ibid.*[2] The court further observed that, even after the bankruptcy judge entered judgment, petitioner had "abandoned its motion to withdraw the reference"; had never argued during its appeal to the district court that the bankruptcy court had lacked authority to enter final judgment; and had not raised that argument in the court of appeals until "the eve of oral argument." *Id.* at 29a-30a. "Because [petitioner] waited so long to object, and in light of its litigation tactics," the court of appeals had "little difficulty concluding that [petitioner] impliedly consented to the bankruptcy court's jurisdiction." *Id.* at 30a.

The court of appeals addressed and rejected two arguments against allowing consent to be inferred. First, although bankruptcy rules contemplate only express consent, the court found this situation parallel to that in *Roell* v. *Withrow*, 538 U.S. 580 (2003), in which this Court held that implied consent was sufficient to support a magistrate judge's civil jurisdiction under 28 U.S.C. 636(c)(1). Pet. App. 31a-32a. Second, while recognizing that this case was already pending in the Ninth Circuit when this Court decided *Stern*, the court of appeals found that petitioner "had ample reason to be alert to the possible jurisdictional problem." *Id.* at 32a. The court explained that the Ninth Circuit's own opinion in *Stern* had been issued on March 19, 2010, while petitioner's motion to withdraw the reference was still pending before the district court, and that petitioner was well aware of *Granfinanciera*, "which thoroughly foreshadowed the result in *Stern*." *Ibid.* Finally, the court noted

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[2] In support of this statement, the court of appeals cited the district court order (reprinted at Pet. App. 62a-63a) that was filed two weeks after the parties' joint status report contemplating further pretrial proceedings in the bankruptcy court.

that petitioner should not be permitted to sandbag the court by "fully litigat[ing] the fraudulent conveyance action before the bankruptcy court and the district court, without so much as a peep about Article III," and only later "assert[ing] a right it never thought to pursue when it still believed it might win" on the merits. *Id.* at 33a.

d. Having found that petitioner had consented to the bankruptcy judge's entry of judgment, the court of appeals turned to the merits of the summary-judgment decision. The court concluded that the bankruptcy court had correctly granted judgment for respondent on its federal- and state-law fraudulent-conveyance claims and on the question of petitioner's "successor liability." Pet. App. 33a-39a.

SUMMARY OF ARGUMENT

I. Although petitioner was constitutionally entitled to have the fraudulent-conveyance claim against it decided by an Article III judge, petitioner's right to that decisionmaker was a waivable personal right. The division of authority between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction. Both in the bankruptcy context and in cases involving delegations of authority to magistrate judges, this Court and the courts of appeals have recognized that litigant consent can authorize the entry of final judgment by a non-Article III judge.

The 1984 Act provides that, even in non-core proceedings, the bankruptcy court may enter final judgment if all parties consent to that approach. In this case, petitioner's consent to entry of judgment by the bankruptcy judge can and should be inferred from petitioner's litigation conduct. Petitioner contends that, in light of adverse circuit precedent in effect at the time of

the bankruptcy-court proceedings, it had no choice but to acquiesce in the bankruptcy court's decision to resolve the summary-judgment motion. In its answer to respondent's complaint, however, petitioner *denied* that the matter was a core proceeding, indicating that it believed it had a right to insist on an Article III decisionmaker. In any event, if petitioner had preferred that the district court resolve the summary-judgment motion, it could have pursued a request to withdraw the reference.

Even if this Court holds that petitioner did not give constitutionally valid consent to entry of judgment by the bankruptcy court, it would be inappropriate to vacate the judgment below. A litigant's failure to assert a timely objection often precludes it from obtaining relief on appeal, even in circumstances where the litigant's acquiescence cannot legitimize the trial court's conduct. Vacatur of the judgment in this case would reward sandbagging, confer an unjustified windfall on petitioner, and unfairly diminish the assets available to pay Bellingham's creditors.

II. In circumstances like these, where the 1984 Act designates a particular matter as a "core" proceeding, but the Constitution entitles a litigant to have judgment entered by an Article III decisionmaker, the bankruptcy court may enter proposed findings of fact and conclusions of law. The 1984 Act states that "[b]ankruptcy judges may hear and determine * * * all core proceedings * * * and may enter appropriate orders and judgments." 28 U.S.C. 157(b)(1). That permissive authorization does not preclude the bankruptcy court in core proceedings from taking lesser steps such as the issuance of proposed findings and conclusions. In any event, the legal effect of this Court's decisions in *Granfinanci-*

era v. *Nordberg*, 492 U.S. 33 (1989), and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), is to remove the fraudulent-conveyance claim at issue here from core bankruptcy jurisdiction. Under established principles of severability, the claim should therefore be treated, for purposes of the statutory allocation of responsibilities between the bankruptcy and district courts, as a non-core matter. That approach is consistent with the weight of recent lower-court authority, and with many local rules and orders that authorize bankruptcy judges to submit proposed findings of fact and conclusions of law when Article III precludes them from entering final judgment on a particular matter.

ARGUMENT

I. THE RIGHT TO HAVE CERTAIN FRAUDULENT-CONVEYANCE ACTIONS ADJUDICATED BY AN ARTICLE III JUDGE MAY BE WAIVED BY THE PARTIES' EXPRESS OR IMPLIED CONSENT TO ADJUDICATION BY A BANKRUPTCY JUDGE

The court of appeals correctly held that, in the absence of the parties' consent, a bankruptcy judge may not enter final judgment in a fraudulent-conveyance action that is brought against a party who has not filed a claim against the estate. Pet. App. 9a-23a. That conclusion follows from this Court's decisions in *Granfinanciera* v. *Nordberg*, 492 U.S. 33 (1989), and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). The square holding in *Granfinanciera* involved only the Seventh Amendment right to a jury trial. See 492 U.S. at 50, 64 n.19. The Court's opinion, however, drew a direct parallel with Congress's ability "to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. The Court concluded that "a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C.

§ 548(a)(2) seems * * * more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55.

In *Stern*, the Court addressed Article III issues in the context of a counterclaim for tortious interference. 131 S. Ct. at 2604. The Court equated that counterclaim with the fraudulent-conveyance action in *Granfinanciera* and found that the defendant was entitled to insist on entry of final judgment by an Article III judge. *Id.* at 2614-2615. Thus, to the extent that 28 U.S.C. 157(b)(1) and (2)(H) authorize a bankruptcy judge to enter judgment without the parties' consent in a fraudulent-conveyance action against a party that has not filed a claim against the estate, those statutory provisions are inconsistent with Article III.

Because the counterclaim defendant in *Stern* had objected to the bankruptcy court's exercise of jurisdiction over the counterclaim, see 131 S. Ct. at 2607, the only potential ground for inferring consent was the defendant's pursuit of his own claim against the estate. The Court found that inference unwarranted, explaining that the counterclaim defendant "did not truly consent to resolution of [the counterclaim] in the bankruptcy court proceedings" because "[h]e had nowhere else to go if he wished to recover from [the bankrupt's] estate." *Id.* at 2614. The Court in *Stern* did not cast doubt, however, on the established proposition that parties who would otherwise have the right to an Article III decisionmaker may consent to an alternative adjudicator.[3]

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[3] The Court in *Stern* also distinguished a separate line of decisions represented by *Katchen* v. *Landy*, 382 U.S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U.S. 42 (1990) (per curiam), in which the Court has upheld the authority of bankruptcy courts to adjudicate trustees' voidable-preference claims against persons who have filed

A. In The Context Of A Bankruptcy Proceeding, The Right To A Final Adjudication By An Article III Judge Is A Waivable Personal Interest

In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 848 (1986), the Court held that "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States * * * serves to protect primarily personal rather than structural interests." The Court further explained that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848-849. The Court observed, however, that Article III "also serves as an inseparable element of the constitutional system of checks and balances" by "preventing the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 850 (internal quotation marks and citations omitted). It recognized that, "[t]o the extent that this structural principle is implicated in a given case, the parties cannot

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claims against the estate. See *Stern*, 131 S. Ct. at 2616-2617. As the Court observed in *Stern*, bankruptcy-court adjudication of such claims is appropriate because the bankruptcy court often must decide whether a voidable preference has occurred in order to determine whether the creditor's own claim should be allowed. See *ibid.* In *Stern* itself, by contrast, disposition of the counterclaim required the bankruptcy court to resolve various issues not implicated by the counterclaim defendant's own claim against the estate. See *id.* at 2617-2618. The rationale articulated in *Katchen* and *Langenkamp*, and subsequently reaffirmed in *Stern*, would also apply to fraudulent-conveyance actions against persons who have filed claims against the estate. That rationale is inapplicable here, however, because petitioner did not file such a claim.

by consent cure the constitutional difficulty." *Id.* at 850-851.

The right to insist on adjudication by an Article III judge in a bankruptcy proceeding is "primarily personal." *Schor*, 478 U.S. at 848. Thus, while petitioner was entitled to insist that the fraudulent-conveyance claim against it be decided by an Article III judge, petitioner could also consent to resolution of that claim by the bankruptcy court.

1. The division of tasks between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction, which is vested in the district court

Petitioner seeks to analogize the Article III question here to questions of subject-matter jurisdiction. Br. 24, 36-37. An Article III court must police the constitutional and statutory boundaries of its subject-matter jurisdiction and cannot exceed them even with the litigants' consent. See, *e.g.*, *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). That explains the result in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and other cases that petitioner invokes (Br. 19-20).

That rationale does not apply here. Petitioner and respondent unquestionably have a "Case[]" or "Controvers[y]" in the sense required by Article III, Section 2, Clause 1. And, with respect to statutory jurisdiction, this Court recognized in *Stern* that Congress's allocation in 28 U.S.C. 157 of "the authority to enter final judgment between the bankruptcy court and the district court * * * does not implicate questions of subject matter jurisdiction." 131 S. Ct. at 2607.

Since the 1984 Act, Congress has vested subject-matter jurisdiction over bankruptcy cases and proceed-

ings in the district courts. See 28 U.S.C. 1334(a) and (b). Bankruptcy judges have been given no jurisdiction of their own; their authority depends entirely on a district court's reference of a case or proceeding within *its* jurisdiction. See 28 U.S.C. 157(a) and (b). And if the district court makes such a reference, the court may withdraw it, in whole or in part, either *sua sponte* or on a party's timely motion. See 28 U.S.C. 157(d). Even when the litigants affirmatively consent to entry of final judgment by a bankruptcy judge, the statute provides only that the district court "may refer" the matter to the bankruptcy court—not that it is obligated to do so. See 28 U.S.C. 157(c)(2). After a bankruptcy court enters judgment, the district court retains the authority to hear an appeal and to set the judgment aside if it is erroneous. See 28 U.S.C. 158(a)(1).[4]

Thus, while both the Constitution and the 1984 Act limit the district courts' authority to seek assistance from bankruptcy judges, those limits do not implicate the subject-matter jurisdiction of either tribunal. Cf. *Peretz* v. *United States*, 501 U.S. 923, 953-955 (1991) (Scalia, J., dissenting) (finding that, where the district court undoubtedly had subject-matter jurisdiction, "[t]he fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which

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[4] An appeal to the district court of a bankruptcy judge's final judgment is taken in the same manner as appeals in civil proceedings are generally taken to the court of appeals from a district court judgment. See 28 U.S.C. 158(c)(2). Here, because the bankruptcy judge granted summary judgment, the district court reviewed the judgment *de novo*, considering afresh whether there was a genuine issue of material fact and whether respondent, as movant, was entitled to judgment as a matter of law. Pet. App. 45a.

it acted, but not to its jurisdiction to act"). In such a circumstance, the better analogy for the Article III right is not to subject-matter jurisdiction, but to "a defect in jurisdiction over the person," where waiver is eminently possible. *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc) (Kennedy, J.) (drawing that analogy in the context of referrals, with consent, to magistrate judges), cert. denied, 469 U.S. 824 (1984).

2. In bankruptcy and similar contexts, the Court has repeatedly relied on a timely objection to trigger enforcement of a party's right to an Article III decisionmaker

a. As respondent notes (Br. 34), every case in which this Court has found a violation of a litigant's right to an Article III decisionmaker "has involved an objecting defendant forced to litigate its private rights involuntarily before a non-Article III judge." In discussing bankruptcy practice in particular, the Court has repeatedly recognized the importance of a party's objection to a non-Article III decisionmaker. Thus, in *Schor*, the Court explained that "the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining [in *Northern Pipeline*] that Article III forbade such adjudication." 478 U.S. at 849; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 80 n.31 (1982) (plurality opinion); *id.* at 91 (Rehnquist, J. concurring in the judgment); *id.* at 95 (White, J., dissenting). Similarly in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court gave the following description of what *Northern Pipeline* had "establishe[d]": "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment,

and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Id.* at 584 (emphasis added).[5]

Most recently, the Court in *Stern* quoted and endorsed that description of *Northern Pipeline*'s holding, saying: "Substitute 'tort' for 'contract,' and that statement directly covers this case." 131 S. Ct. at 2615. The Court offered that endorsement, moreover, in an opinion that was acutely attentive to questions of consent. In upholding the respondent's challenge to the bankruptcy-

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[5] In this regard, the Court's recent decisions are consistent with pre-1978 bankruptcy practice, under which bankruptcy judges' forebears exercised broad powers to adjudicate claims that, in the absence of the parties' consent, would have lain within the district courts' exclusive authority. For instance, under the 1898 Bankruptcy Act, the power to decide bankruptcy matters was divided between district courts and bankruptcy "referees" who were appointed and removable by the district court. See Act of July 1, 1898, ch. 541, §§ 34-39, 30 Stat. 555-556. In *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), the Court held that although the statute authorized district courts to decide, in a "plenary" proceeding, a trustee's claim to set aside a voidable preference, a bankruptcy referee could hear and determine such a matter if the parties had consented to a summary disposition. *Id.* at 268; accord *Northern Pipeline*, 458 U.S. at 53 (plurality opinion) ("with consent, the bankruptcy court also had jurisdiction over some 'plenary' matters"). Because *MacDonald* involved a litigant's waiver of a *statutory* right to plenary proceedings before the district court, the Court did not directly address whether consent is sufficient to permit a non-Article III decisionmaker to resolve a claim in instances where the right to district-court determination is founded on the Constitution. *MacDonald* nonetheless demonstrates that, as a matter of historical practice, the right to adjudication of bankruptcy claims by an Article III judge, rather than by a non-Article III adjudicator subject to the district court's appointment and removal, was long regarded as a personal right subject to waiver.

court judgment entered against it on the debtor's counterclaim, the Court in *Stern* explained that the respondent had "not truly consent[ed] to resolution of [the counterclaim] in the bankruptcy court." *Id.* at 2614. By contrast, the Court rejected the respondent's contention that the bankruptcy court lacked authority to adjudicate his own defamation claim against the debtor, explaining that respondent *had* "consented to the Bankruptcy Court's resolution of [that] claim." 131 S. Ct. at 2606. Thus, *Stern* itself refutes the contention (Pet. Br. 26) that "*Stern* conclusively established" the irrelevance of consent to an Article III challenge to a bankruptcy court's entry of final judgment.

b. Petitioner's approach is also at odds with decisions holding that federal magistrate judges may, with the litigants' consent, enter final judgment in cases otherwise committed for resolution to an Article III court. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, provides that, "[u]pon the consent of the parties, a full-time United States magistrate judge * * * may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. 636(c)(1). Like bankruptcy judges, magistrate judges are appointed for a limited term and thus lack Article III's tenure protections. See 28 U.S.C. 631(e).

In *Roell* v. *Withrow*, 538 U.S. 580 (2003), the Court held that the litigants' consent, which was inferred from their litigation conduct, was sufficient to permit a magistrate judge to enter final judgment in a damages action under 42 U.S.C. 1983. 538 U.S. at 591. Petitioner attempts (Br. 32 n.4) to distinguish *Roell* on the ground that it decided only a statutory question. But the Court

in *Roell* recognized that the statute was "meant to preserve a litigant's [constitutional] right to insist on trial before an Article III judge." 538 U.S. at 588 (citing *Schor*'s discussion of Article III). And the Court concluded that, under its reading of the statute, "the Article III right is substantially honored," *id.* at 590—which would be a particularly odd thing to say if the Court were turning a blind eye to constitutional concerns.[6]

The courts of appeals have uniformly held, as a constitutional matter, that a magistrate judge may, with the litigants' consent, enter final judgment in a case otherwise reserved to an Article III judge. In *Pacemaker Diagnostic Clinic*, for example, the en banc Ninth Circuit recognized that the right to an adjudication by an Article III judge is "personal to the parties" and "may be waived." 725 F.2d at 542. With respect to separation-of-powers considerations, it further determined that Congress had not attempted to confer expanded subject-matter jurisdiction upon an Article III court, that no other branch was attempting to arrogate power from the judiciary to itself, and that the judiciary maintained constitutionally sufficient supervisory and managerial authority over the magistrate system, including the power to control which matters could be decided by magistrates and to conduct appellate review of magistrates' decisions. *Id.* at 543-546; see 12 Charles Alan Wright et al., *Federal Practice and Procedure* § 3071.1,

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[6] Although petitioner invokes (Br. 32 n.4) the "serious constitutional concerns" referenced in the *Roell* dissent, that opinion recognized that parties may "knowingly and voluntarily waive their right to an Article III judge." 538 U.S. at 595 (Thomas, J.). So did the party who argued that waiver had not occurred on the facts of that case. See Resp. Br. at 28, *Roell*, *supra* (No. 02-69) ("Individuals * * * can choose to forgo their personal right to an Article III judge.").

at 398 n.18 (2d ed. 1997) (citing cases from eleven other circuits upholding the constitutionality of referrals to magistrate judges).

Because the same things are true with respect to bankruptcy judges, petitioner's argument against waiver impugns the constitutionality of the federal system's well-established use of magistrate judges.

3. Bankruptcy-judge adjudications do not raise sufficient separation-of-powers concerns to render the Article III right nonwaivable

In light of *Schor*'s reference to the nonwaivable "structural" component of Article III (478 U.S. at 850-851), petitioner contends (Br. 26) that *Stern* "conclusively established" the nonwaivability of an Article III objection to entry of final judgment by a bankruptcy judge on a matter of private rights, because *Stern* observed that such an act "really [is] a threat to the separation of powers," 131 S. Ct. at 2620. Neither *Stern* nor *Schor* supports that conclusion. As discussed above (pp. 19-20, *supra*), the Court in *Stern* referred to the absence of litigant consent in its restatement of the governing Article III principle, and the Court explained that the respondent there "did not truly consent to resolution" by the bankruptcy judge of the counterclaim against him. *Id.* at 2614-2615. Thus, "[t]he constitutional bar" announced in *Stern* (*id.* at 2619) precluded adjudication of the state-law counterclaim by a non-Article III decisionmaker in the *absence* of the parties' consent.

The impingement on the judiciary in this case is manifestly less threatening than the regime at issue in *Schor*, which was held not to violate Article III even though it permitted an Executive Branch agency to adjudicate common-law counterclaims. 478 U.S. at 850-857. Bankruptcy judges are "judicial officers of the

United States district court," appointed by courts of appeals, and removable for cause by judicial councils. 28 U.S.C. 152(a)(1) and (e). Their authority in any case depends entirely on a reference from a district court, which can be withdrawn, and their decisions are subject to appellate review by the courts. 28 U.S.C. 157(a) and (d); 28 U.S.C. 158 (2006 & Supp. V 2011). Accordingly, their authority to enter final judgment does not risk "the encroachment or aggrandizement of one branch at the expense of the other." *Schor*, 478 U.S. at 850 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976)).

B. Consent To Bankruptcy-judge Adjudication May Be Inferred From Litigation Conduct

In the alternative, petitioner contends that, even if a party may consent to bankruptcy-judge adjudication, such consent must be expressly provided for by statute, Pet. Br. 28-36, or should not otherwise have been found on the facts of this case, *id.* at 38-46.

1. There is no merit to petitioner's contention that consent to a non-Article III decisionmaker is invalid whenever the governing statute does not expressly provide for it. "[I]n the context of a broad array of constitutional and statutory provisions," the Court has not deemed waiver to be "presumptively unavailable absent some sort of express enabling clause," but has "instead * * * adhered to the opposite presumption." *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995). In *Roell*, the Court was willing to infer consent to magistrate-judge adjudication from the parties' litigation conduct, even though that statute did not prescribe what form consent must take, and even though the relevant rule of civil procedure required express consent in writing. 538 U.S. at 586-587. Because the parties had been made aware of the need for consent and the right

to refuse it, the Court refused to allow them to "sit back without a word about their failure to file the form, with a right to vacate any judgment that turned out not to their liking." *Id.* at 590.

In any event, the 1984 Act *does* reflect Congress's express determination that the consent of the parties provides a sufficient justification for bankruptcy-court resolution of matters that would otherwise be reserved to the district court. Although the bankruptcy court's authority in non-core proceedings is ordinarily limited to submitting "proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1), Congress authorized the bankruptcy court to enter final judgment in such matters "with the consent of all the parties to the proceeding," 28 U.S.C. 157(c)(2). To be sure, Section 157(c)(2) does not literally encompass the fraudulent-conveyance claim at issue here because that claim is defined by the 1984 Act as a core rather than a non-core proceeding. See 28 U.S.C. 157(b)(2)(H). But once it is determined that the claim cannot constitutionally be treated as a core proceeding for purposes of the 1984 Act provisions that allocate power between the bankruptcy and district courts, Section 157(c)(2) provides an appropriate statutory ground for treating the parties' consent as a sufficient basis for the bankruptcy court to act. Cf. pp. 30-32, *infra*.

2. Petitioner contends that its acquiescence in the bankruptcy judge's resolution of the parties' summary-judgment motions did not amount to constitutionally valid consent. That is so, petitioner argues, because the 1984 Act authorizes bankruptcy judges to decide core proceedings (defined to include the fraudulent-conveyance claim at issue here) without the parties' consent, and because any Article III objection to that

mode of proceeding would have been futile in light of then-extant Ninth Circuit precedent. Pet. Br. 38-46.

That explanation for petitioner's acquiescence is inconsistent with petitioner's own prior litigation conduct. In its answer to respondent's adversary complaint, petitioner *denied* respondent's allegation that the matter was a "core proceeding." See J.A. 50, 80; p. 5, *supra*. Under the framework established by the 1984 Act, that statement logically implied that petitioner believed it had the right to grant or withhold its consent to the entry of final orders or judgment by the bankruptcy judge.

In any event, the fact that the bankruptcy judge *could* continue to hear pretrial proceedings under circuit precedent did not mean that it was *required* to do so. If petitioner had preferred that the district court resolve the summary-judgment motions, it could have pursued a motion to withdraw the reference. Pet. App. 29a. Petitioner identifies no reason to assume that such a request would have been futile, see 1 Alan N. Resnick et al., *Collier Bankruptcy Manual* ¶ 3.04[1][b], at 3-38 & n. 4 (4th ed. June 2013) (noting that courts consider a variety of factors in deciding whether to withdraw a reference, including the inability of the bankruptcy court to hold a jury trial without the parties' consent), and its failure to pursue that course reinforces the inference that petitioner was content to have the bankruptcy court resolve the motion. Petitioner's argument suggests that, even if petitioner had expressed an affirmative *preference* for bankruptcy-court resolution of the summary-judgment motion (*e.g.*, if respondent had moved to withdraw the reference and petitioner had opposed that request), its consent to that mode of proceeding would be invalid because then-extant circuit precedent indicated that

petitioner had no valid *constitutional* objection. This Court's precedents do not support that extreme view of the prerequisites to valid consent. Cf. *Brady* v. *United States*, 397 U.S. 742, 757 (1970) (holding that "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty [legal] premise" about the potential penalty).

C. Even If This Court Holds That Petitioner's Litigation Conduct Did Not Amount To Constitutionally Valid Consent To Bankruptcy-judge Resolution Of Respondent's Fraudulent-conveyance Claim, Petitioner Is Not Entitled To Vacatur Of The Judgment Below

For the foregoing reasons, petitioner's litigation conduct provided a constitutionally valid justification for the bankruptcy court's disposition of respondent's summary-judgment motion. But even if this Court concludes otherwise (either on the ground that the parties' consent cannot justify a bankruptcy court's entry of judgment on a matter of private right, or on the ground that petitioner's own conduct did not amount to valid consent), petitioner would not be entitled to relief from the judgment below.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In some circumstances, the effect of a litigant's agreement is that no error occurs at all. See *id.* at 733 (explaining that, "[b]ecause the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that

right, his conviction without a trial is not 'error'"). In other instances, a trial judge may be legally forbidden to take particular action, even if the parties affirmatively request that he do so. See *Freytag* v. *Commissioner*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that, even if both parties urge a judge "to disregard a structural limitation upon his power," "the judge must tell them no"). But even in that category of cases, a litigant's failure to assert a contemporaneous objection will often prevent him from obtaining relief on appeal. See *ibid.* (distinguishing the question whether a litigant's consent has a "*legitimating* effect" from the question whether "a judgment already rendered [must] be set aside because of an alleged structural error to which the losing party did not properly object"); *Stern*, 131 S. Ct. at 2608 (noting the "particularly severe" consequences that arise when a litigant is permitted to "remain[] silent about his objection and belatedly rais[e] the error only if the case does not conclude in his favor") (internal quotation and citation omitted); *Olano*, 507 U.S. at 733-737.

In addition to the considerations that generally support contemporaneous-objection requirements, two aspects of this case would make vacatur of the judgment below particularly inappropriate, even if the Court were to hold that the bankruptcy court was not authorized to enter final judgment under the circumstances presented here. *First*, petitioner's litigation conduct cannot fairly be viewed as a reasonable response to then-prevailing Ninth Circuit precedent. Having denied that respondent's adversary complaint was a "core proceeding," petitioner breached the requirement of Federal Rule of Bankruptcy Procedure 7012(b) that petitioner state whether or not it consented to bankruptcy-judge adjudi-

cation. And when the district court requested a "joint status report" addressing appropriate pre-trial proceedings, J.A. 104, petitioner neither signed the report (to which the other parties agreed) nor offered its own competing views. At the very least, petitioner's disregard for the Rule and the court order contributed to the impression that the bankruptcy court's authority to act was uncontroverted. Vacatur would thus reward precisely the type of sandbagging that contemporaneous-objection rules are intended to discourage.

Second, even without the parties' consent, the bankruptcy court would have been authorized to submit proposed findings of fact and conclusions of law concerning respondent's fraudulent-conveyance claim. See pp. 29-32, *infra*. Since the district court reviewed and sustained the bankruptcy court's summary-judgment ruling under a *de novo* standard, there is no reason to suppose that the district court would have reached a different conclusion if the bankruptcy court had submitted such proposed findings and conclusions rather than entering an appealable final judgment. Because petitioner is very unlikely to have been prejudiced by the bankruptcy court's entry of final judgment, vacatur would confer an unjustified windfall and unfairly diminish the assets available to pay Bellingham's creditors. Cf. *Olano*, 507 U.S. at 734-735 (explaining that, when criminal defendant seeks plain-error review on grounds not preserved at trial, reversal is ordinarily inappropriate unless defendant was prejudiced by the error).

II. A BANKRUPTCY JUDGE WHO CANNOT CONSTITUTIONALLY ENTER FINAL JUDGMENT MAY MAKE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT WILL BE SUBJECT TO THE DISTRICT COURT'S *DE NOVO* REVIEW

Petitioner's second question presented (Pet. i, 46-57) attacks the court of appeals' conclusion that, when "the Constitution prohibits bankruptcy judges from entering a final judgment," those judges have "statutory authority to hear and enter proposed findings of fact and conclusions of law in a fraudulent conveyance proceeding asserted by a bankruptcy trustee against a noncreditor, subject to de novo review by a federal district court," Pet. App. 24a, 26a. Petitioner's objections to that analysis lack merit. Indeed, the Court in *Stern* expressed the expectation that its holding would not "meaningfully change[] the division of labor in the current statute," and it observed with apparent approval that the respondent there "ha[d] not argued that bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on those matters." 131 S. Ct. at 2620 (internal quotation marks and citation omitted).

A. The Statutory Text Does Not Preclude The Use Of Proposed Findings Of Fact And Conclusions Of Law In These Circumstances

Congress has generally prescribed two sets of procedures for bankruptcy judges, one of which applies to core proceedings and the other to non-core proceedings. Petitioner contrasts (Br. 50) the authorization to "hear and determine" core proceedings, 28 U.S.C. 157(b)(1), with the power to "submit proposed findings of fact and conclusions of law to the district court" in non-core proceedings, 28 U.S.C. 157(c)(1). Petitioner argues (Br.

48-49, 51-53) that, because the word "determine" in Section 157(b)(1) is uniformly understood to confer the power to enter final judgment, bankruptcy courts in core proceedings lack statutory authority to take the lesser step of submitting proposed findings and conclusions to district courts.

As respondent points out (Br. 66), however, the language of Section 157(b)(1) is permissive, providing that "[b]ankruptcy judges *may hear* and determine all cases under title 11 and all core proceedings * * * *and may enter* appropriate orders and judgments." 28 U.S.C. 157(b)(1) (emphases added). The grant of *permission* both to hear and to determine does not literally foreclose intermediate options, such as the issuance of proposed findings of fact and conclusions of law. In that regard, Section 157(b)(1) differs from a nearby provision, which states that a bankruptcy judge "shall determine" whether or not "a proceeding is a core proceeding." 28 U.S.C. 157(b)(3).

B. Where The Constitution Forbids Bankruptcy Courts From Using The Procedures Applicable To Core Proceedings, Principles Of Severability Warrant The Use Of The Procedures That Apply To Non-core Proceedings

This case does not present the question whether a bankruptcy court may issue proposed findings of fact and conclusions of law in a proceeding that, for *both* statutory *and* constitutional purposes, is appropriately treated as a "core" proceeding. Rather, the question is whether the bankruptcy court may issue such proposed findings and conclusions with respect to a matter that the 1984 Act designates as "core," but that the Constitution requires be decided by an Article III judge. The Court in *Stern* characterized its decision as effecting "the removal of counterclaims such as [the *Stern* debt-

or's] from core bankruptcy jurisdiction." 131 S. Ct. at 2620. If the fraudulent-conveyance claim at issue in this case is similarly "remov[ed] * * * from core bankruptcy jurisdiction" pursuant to Article III, the logical consequence is that it should be treated, for purposes of the 1984 Act's allocation of authority between bankruptcy and district courts, as "a proceeding that is not a core proceeding." 28 U.S.C. 157(c)(1). Under that approach, the bankruptcy court in a case like this one has the same authority to "submit proposed findings of fact and conclusions of law" (*ibid.*) that it has in proceedings that Congress itself has designated as non-core.[7]

That result is consistent with the Court's obligation, when declaring a federal statute unconstitutional, to "sever[] any problematic portions while leaving the remainder intact," unless it is "evident that Congress, faced with the limitations imposed by the Constitution, would have preferred" a different result. *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161, 3162 (2010) (internal quotation marks and citations omitted). Far from effectuating any evident congressional intent, petitioner's contrary approach would create an anomalous statutory gap, preventing bankruptcy courts in matters like this one from exercising the statutory powers that apply to *either* core *or* non-core proceedings. Petitioner's crabbed reading of the statute is contrary not only to established severabil-

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[7] The alternative proposed by one amicus brief—that district judges be prohibited from using bankruptcy judges to make proposed findings of fact and conclusions of law in core proceedings, but be allowed to solicit precisely such recommendations from magistrate judges (Robert R. McCormick Found. Amicus Br. 11-12)—seems particularly fanciful, as it disregards bankruptcy judges' specialized knowledge and expertise.

ity principles, but also to the great weight of the lower-court decisions concluding that, "although the Bankruptcy Court may not ordinarily enter final judgment on avoidance claims, it may nonetheless hear the case in the first instance and recommend proposed findings of fact and conclusions of law." *Securities Investor Prot. Corp.* v. *Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46, 49 (S.D.N.Y. 2013); see also, *e.g.*, *In re Parco Merged Media Corp.*, 489 B.R. 323, 325-327 (D. Me. 2013) (collecting cases and joining the "emerging consensus"). As petitioner acknowledges, its reading additionally conflicts with many local rules and orders that authorize bankruptcy judges to "hear the proceeding and submit proposed findings of fact and conclusions of law to the district court" when a determination is made that "entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III." Pet. Br. 54 (quoting *In re Standing Order of Reference Re: Title 11*, No. 12-MISC-32 (S.D.N.Y. Jan. 31, 2012)).[8]

To be sure, Congress may ultimately choose to respond to *Stern* in a different or more comprehensive way. See Pet. Br. 56-57. But Congress's "editorial freedom" "to pursue [various] options going forward" (*Free Enter. Fund*, 130 S. Ct. at 3162) does not prevent the courts in the meantime from adopting a minimalist approach that, as here, suffices to cure the constitutional problem without "circumvent[ing] the intent of the legislature." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330 (2006)) (internal quotation marks and citation omitted). The decision below appropriately does that.

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[8] Similar provisions have been incorporated into local bankruptcy rules or standing orders in at least 25 districts. See App., *infra*, 15a-17a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 28 U.S.C. 157 provides:

Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a pro-

ceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

2. 28 U.S.C. 158 (2006 & Supp. V 2011) provides:

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals[1]

(1) from final judgments, orders, and decrees;

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[1] So in original. Probably should be followed by a dash.

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established,

to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

3. 28 U.S.C. 636(b)-(c) (2006 & Supp. V 2011) provides:

Jurisdiction, powers, and temporary assignment

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief[1] made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

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[1] So in original. Probably should be "post-trial".

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent with-

out adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

4. 28 U.S.C. 1334(a)-(b) provides:

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

APPENDIX B

The following local rules and standing orders have provided that bankruptcy judges may make findings of fact and conclusions of law in a core proceeding under 28 U.S.C. 157(b) when entry of final judgment would be inconsistent with Article III, or that district courts may treat bankruptcy court orders as proposed findings of fact and conclusions of law:

District of Alaska: Local Bankr. R. 9033-2 (Sept. 19, 2012)

Central District of California: General Order No. 13-05, *In re: Reference of Cases and Proceedings to the Bankruptcy Judges of the Central District of California, and Reference of Appeals to the Bankruptcy Appellate Panel* (July 1, 2013)

Northern District of California: General Order No. 24, *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges and Authorizing Bankruptcy Appeals To Be Decided by the Ninth Circuit Bankruptcy Appellate Panel*, Part I, 1.01 (May 15, 2012)

District of Delaware: *In re: Standing Order of Reference Re: Title 11* (Feb. 29, 2012)

Middle District of Florida: *In re: Standing Order of Reference Cases arising Under Title 11, United States Code*, No. 12-MISC-26 (Feb. 22, 2012)

Northern District of Florida: *In re: Standing Order of Reference Regarding Title 11*, No. 95-MC-40111 (June 5, 2012)

Southern District of Florida: Admin. Order 2012-25, *In re Bankruptcy Proceedings* (Mar. 21, 2012)

Middle District of Georgia: *In re: Standing Order of Reference Re: Title 11* (Feb. 17, 2012)

Southern District of Indiana: Local Bankr. R. 9033-1 (Dec. 3, 2012)

District of Kansas: Standing Order 13-1, Re: Title 11 Cases (June 24, 2013)

Western District of Louisiana: SO 1.32, *General Order of Reference* (June 1, 2012)

District of Maryland: Standing Order 2012-05, *In re: Title 11 Proceedings* (July 24, 2012)

District of Massachusetts: Local R. 206 (June 5, 2012)

District of Nevada: Local Bankr. R. 1001(b)(1), 9033.1 (Jan. 1, 2013)

District of New Jersey: *In re: Standing Order of Reference to the Bankruptcy Court under Title 11*, No. 12-1 (Sept. 18, 2012)

Eastern District of New York: Order, *In re: The Referral of Matters to the Bankruptcy Judges* (Dec. 5, 2012) (given nunc pro tunc effect as of June 23, 2011)

Southern District of New York: Local Bankr. R. 9033-1 (Apr. 16, 2012); *In re: Standing Order of Reference Re: Title 11*, 12-MISC-32 (Jan. 31, 2012)

Western District of New York: *In re: Standing Order of Reference Re: Title 11* (Feb. 29, 2012)

Middle District of North Carolina: Local Bankr. R. 9033-1 (Apr. 20, 2012)

Northern District of Ohio: General Order No. 2012-7, *Referral of Title 11 Matters in the U.S. Bankruptcy Court for the Northern District of Ohio* (Apr. 4, 2012)

Southern District of Texas: Local Bankr. R. 9033-1 (Oct. 7, 2013); General Order 2012-6, *In re: Order of Reference to Bankruptcy Judges* (May 24, 2012)

Western District of Texas: *In re: Order of Reference to Bankruptcy Judges* (Oct. 4, 2013)

District of Vermont: Local Bankr. R. 9033-1 (Oct. 15, 2012); *In re: Standing Order of Reference Re: Title 11* (June 22, 2012)

Western District of Washington: Local R. 87(a) (Dec. 1, 2012)

Northern District of West Virginia: *In re: Administration of the United States Bankruptcy Court*, Misc. No. 5:13-MC-12 (Apr. 2, 2013)

AMICUS CURIAE BRIEF

12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

—v.—

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PROFESSORS RICHARD AARON, LAURA BETH BARTELL, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, JOHN COLLEN, JESSICA DAWN GABEL, JACKIE GARDINA, GEORGE W. KUNEY, ADAM J. LEVITIN, ANGELA LITTWIN, STEPHEN J. LUBBEN, LOIS R. LUPICA, C. SCOTT PRYOR, THERESA J. PULLEY RADWAN, NANCY B. RAPOPORT, MARIE T. REILLY, LYNNE F. RILEY, MICHAEL D. SOUSA, ETTIE WARD, AND ROBERT M. ZINMAN, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 2

POINT I

PETITIONER'S LITIGATION CONDUCT ESTABLISHED ITS CONSENT TO THE BANKRUPTCY COURT'S ADJUDICATION OF THE SUMMARY JUDGMENT MOTION 6

A. Implied Consent is an Established Doctrine in the Article III Context 6

B. Petitioner is Charged with Knowledge of Case Law 7

POINT II

SCHOR DEMONSTRATES THAT PETITIONER'S KNOWLEDGE OF ITS ARTICLE III RIGHT IS CONCLUSIVELY PRESUMED FROM ITS DEEMED KNOWLEDGE OF CASE LAW 8

POINT III

THERE WERE MULTIPLE PRE-*STERN* COURT HOLDINGS THAT A FRAUDULENT CONVEYANCE ACTION IS A PRIVATE RIGHT FOR ARTICLE III PURPOSES. PETITIONER DID NOT NEED *STERN* TO LEARN IT HAD AN ARTICLE III RIGHT 10

A. This Court's Decision in *Granfinanciera* Established Petitioner's Article III Right 10

B. Conscientious Review of this Court's Precedents in *Granfinanciera* and *Northern Pipeline* Would Have Alerted Petitioner to Its Article III Right. The Ninth Circuit's Erroneous Holding in *Mankin* Did Not Bar Petitioner's Assertion of the Right. Nor Was *Stern* an Intervening Change in Law.....13

C. The 2010 Decision of the Ninth Circuit in *Marshall v. Stern* Alerted Petitioner to Its Article III Right.....19

POINT IV

THERE IS EVERY INDICATION THAT PETITIONER WAS AWARE THAT IT COULD MAKE A SOUND ARTICLE III OBJECTION, BUT FAILED TO ASSERT IT. GAMESMANSHIP BY SILENCE SHOULD NOT BE ENCOURAGED.....21

CONCLUSION.....27

TABLE OF AUTHORITIES

Cases PAGE

Beitel v. OCA, Inc. (In re OCA, Inc.),
551 F.3d 359 (5th Cir. 2008).....6

Central Hanover Bank & Trust Co. v. Herbst,
93 F.2d 510 (2d Cir. 1937).....7

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986).....3, 8, 9

Crowell v. Benson,
285 U.S. 22 (1932).....11

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967).....16, 17

Duck v. Munn (In re Mankin),
823 F.2d 1296 (9th Cir. 1987).....4, 13, 14

Fed. Deposit Ins. Co. v. Henderson,
940 F.2d 465 (9th Cir. 1991).....7

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) .....*passim*

Hawknet Ltd. v. Overseas Shipping Agencies,
590 F.3d 87 (2d Cir. 2009) 17, 18

In re Owens Corning,
419 F.3d 195 (3d Cir. 2005) 25

Kremer v. Chem., Const. Corp.,
456 U.S. 461 (1982).....25

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600 F.3d 1037 (9th Cir. 2010) .....*passim*

PAGE

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52 F.3d 1330 (5th Cir. 1995).....6

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834 F.2d 1134 (2d Cir. 1987).....6

Migra v. Warren City Sch. Dist. Bd. of Educ.,
465 U.S. 75 (1998).....25

New Jersey v. New York,
523 U.S. 767 (1998).....7

New York Times Co. v. Sullivan,
376 U.S. 254 (1964).....17

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982).....*passim*

Planned Parenthood Cincinnati Region v. Taft,
444 F.3d 502 (6th Cir. 2006).....18

Puckett v. United States,
556 U.S. 129 (2009).....25

Roell v. Withrow,
538 U.S. 580 (2003).....6, 23, 26

Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.,
585 F.3d 58 (2d Cir. 2009).....17

Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com),
504 F.3d 775 (9th Cir. 2007).....15

PAGE

Stern v. Marshall,
131 S. Ct. 2594 (2011) ..... *passim*

Stoll v. Gottlieb,
305 U.S. 165 (1938) 25

United States v. Yazell,
382 U.S. 341 (1966) 7

Winter Storm Shipping, Ltd. v. TPI,
310 F.3d 263 (2d Cir. 2002) 17

Statutes

11 U.S.C. § 548(a)(2) 11

28 U.S.C. § 157(b)(2) 19, 21

28 U.S.C. § 157(c)(1) 22

28 U.S.C. § 157(d) 23

Rules

Fed. R. Bankr. P. 7012(b) 4, 22, 23

Fed. R. Bankr. P. 7056 16

Fed. R. Civ. P. 56 16

INTEREST OF THE AMICI[1]

The *Amici Curiae* are law professors who have devoted their careers to the teaching and study of bankruptcy law.[2] They are keenly interested in this appeal because its outcome will have a significant impact on litigation in bankruptcy cases, particularly the many in which fraudulent conveyance claims are asserted by bankruptcy estates for the benefit of their creditors. Proper administration of bankruptcy cases depends upon the establishment of clear principles gov-

[1] Pursuant to Rule 37 of this Court, the *Amici* file this brief with the written consent of both parties, which is on file with the Clerk. No counsel for any party authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* are the following law professors who teach at the law schools indicated next to their names: *Richard Aaron*, University of Utah S. J. Quinney College of Law; *Laura Beth Bartell*, Wayne State University Law School; *Jagdeep S. Bhandari*, Florida Coastal School of Law; *Susan Block-Lieb*, Fordham University School of Law; *John Collen*, St. John's University School of Law; *Jessica Dawn Gabel*, Georgia State University College of Law; *Jackie Gardina*, Vermont Law School; *George W. Kuney*, University of Tennessee College of Law; *Adam J. Levitin*, Georgetown University Law Center, *Angela Littwin*, University of Texas School of Law, *Stephen J. Lubben*, Seton Hall University School of Law, *Lois R. Lupica*, University of Maine School of Law; *C. Scott Pryor*, Regent University School of Law; *Theresa J. Pulley Radwan*, Stetson University College of Law; *Nancy B. Rapoport*, William S. Boyd School of Law-University of Nevada, Las Vegas; *Marie T. Reilly*, Penn State University-Dickinson School of Law; *Lynne F. Riley*, Boston College Law School; *Michael D. Sousa*, University of Denver-Sturm College of Law; *Ettie Ward*, St. John's University School of Law; and *Robert M. Zinman*, St. John's University School of Law.

erning whether fraudulent conveyance claims may be adjudicated by bankruptcy courts with the consent of the parties and, if so, whether such adjudicatory authority may be exercised on the basis of implied consent and waiver.

The *Amici* believe that under this Court's Article III jurisprudence, a bankruptcy court's exercise of adjudicating authority based on implied consent and waiver by a party does not run afoul of Article III. This brief sets forth the *Amici*'s analysis of why the doctrines of implied consent and waiver apply in this case.

The *Amici* represent no institution, group or association. Their sole purpose is to offer what assistance they can to this Court as it considers this important issue. They believe their brief offers a unique analysis of important case law bearing on the issue.

SUMMARY OF ARGUMENT

The *Amici* support Respondent's position that Article III of the Constitution gives rise to a personal right, and that Article III does not bar the adjudication of an action by a bankruptcy court based on consent of the parties.[3] They argue that express consent is not required, and that an Article III personal right may be waived by implication from litigation conduct, as happened in this case.

[3] Because Respondent's brief fully addresses Petitioner's contention that Article III prohibits an exercise of adjudicatory authority by a bankruptcy judge in a fraudulent conveyance action, this *amicus* brief does not address that basic constitutional issue, and is limited to consideration of implied consent and waiver in the Article III context.

The *Amici* urge that waiving the personal right to have an Article III court adjudicate a fraudulent conveyance action does not require the waiving party to have actual knowledge that it has an Article III court option. Case law establishes that knowledge of the Article III option is imputed based on presumed knowledge of the law. Indeed, contrary to Petitioner's contention, in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), there was no evidence that the party asserting an Article III right had actual knowledge of the existing case law that would have permitted him to bring his action before an Article III court. Presumptive knowledge of such case law was the basis for this Court's conclusion in *Schor* that the party knew of his Article III district court option. Despite the lack of actual knowledge, the party in *Schor* was nevertheless held to have waived his Article III right by litigating the claim in a non-Article III forum without asserting his personal right under Article III. Petitioner, however, mischaracterizes *Schor* as requiring "full knowledge," Pet'r's Br. 40, without acknowledging that such knowledge was clearly grounded on presumed knowledge of case law, as it was in the present fraudulent conveyance case.

This Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), was not essential for Petitioner to know that it had an Article III right. Years before the present action was commenced, this Court's precedent established that a fraudulent conveyance claim is a private right under Article III, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55–56 (1989), thereby giving Petitioner an incontrovertible basis for an Article III

objection. Petitioner, however, mistakenly asserts that a pre-*Granfinanciera* decision by the Ninth Circuit – *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987) – barred it as binding Circuit precedent from asserting an Article III objection. *Mankin* held that a fraudulent conveyance claim was a public right on the theory that it "directly relates to the restructuring of debtor-creditor relations." *Id.* at 1307. Significantly, however, after *Mankin* was decided by the Ninth Circuit, this Court in *Granfinanciera*, by holding that a fraudulent conveyance claim is a *private* right, rejected *Mankin's* holding that a fraudulent conveyance claim is integral to "the restructuring of debtor-creditor relations" for Article III purposes, 492 U.S. 58, thereby repudiating the very basis on which *Mankin* was decided. Petitioner is charged with knowing that this Court had rejected *Mankin*'s theory and that *Mankin* did not prevent Petitioner from asserting its Article III right.

Moreover, Petitioner's answer to the complaint denied that the action was a core proceeding and denied that the bankruptcy court could even hear this case – a position which Petitioner failed to prosecute by, among other things, not filing a statement under Federal Rule of Bankruptcy Procedure 7012(b)[4] that it did not consent to the exercise of authority – a position inconsistent with its litigation posture in the bankruptcy court and on its appeal to the district court from that court's summary judgment. Importantly, that initial denial overwhelmingly shows that Petitioner was, in fact, *actually* aware that it had a right to

[4] Federal Rules of Bankruptcy Procedure are referred to herein as "Bankruptcy Rules."

have the case adjudicated in the district court because that would have been the *only* basis for denying that the action was a core proceeding and also for denying that the bankruptcy court could even hear it.

Rather than revealing its position, Petitioner did not assert its Article III right in its answer or in any other document filed in the bankruptcy or district court, first asserting an Article III objection in its appeal to the Circuit Court. Had Petitioner asserted its right in the bankruptcy court, the litigation could have gone forward in the district court, and both costly litigation of the Article III issue and additional demands on the already overworked judiciary could have been avoided. Implied consent and waiver should be upheld as a basis for adjudication of a private right by a bankruptcy court to avoid gamesmanship. A party should not be permitted to keep its Article III objection secret until after it took its chances in the bankruptcy court and lost there on the merits, and thereafter be allowed to assert such objection, imposing significant additional legal costs on the estate, and causing further delay in the bankruptcy case and reduction in the amount of the distributions of estate assets to creditors.

ARGUMENT

POINT I

PETITIONER'S LITIGATION CONDUCT ESTABLISHED ITS CONSENT TO THE BANKRUPTCY COURT'S ADJUDICATION OF THE SUMMARY JUDGMENT MOTION

A. Implied Consent is an Established Doctrine in the Article III Context

The *Amici* urge this Court to hold that, by its conduct in this litigation, Petitioner impliedly consented to the bankruptcy court's exercise of authority to adjudicate the fraudulent conveyance claim in suit. Petitioner waived its Article III right by not asserting it until after it litigated the case and lost on the merits in the bankruptcy court, and belatedly asserting an Article III objection for the first time in its appeal to the Circuit Court. This Court made it clear in *Roell v. Withrow*, 538 U.S. 580, 582 (2003), that consent to a non-Article III judge's adjudication may be inferred from a party's litigation conduct. As stated in *Roell*, "The question is whether consent can be inferred from a party's conduct during litigation, and we hold that it can be." *Id.* at 582; *see also Men's Sportswear, Inc. v. Sasson Jeans, Inc. (In re Men's Sportswear, Inc.)*, 834 F.2d 1134, 1137 (2d Cir. 1987); *McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1337 (5th Cir. 1995); *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 368 (5th Cir. 2008).

B. Petitioner is Charged with Knowledge of Case Law

Although in some circumstances a party in a bankruptcy case may be aware that it has a right to have the claim at issue adjudicated by a district court, knowledge of such right may also be gained inferentially. It has long been established that a party is deemed to know the case law that governs its destiny. *See United States v. Yazell*, 382 U.S. 341, 346 (1966) (holding that state law applied to a federal agency's collection of its loan, pointed to two reported federal court decisions in finding that the lender "was aware and is chargeable with knowledge that the contract would be subject to [state] law. . . ."; *New Jersey v. New York*, 523 U.S. 767, 809 (1998) (stating that, when writing a Compact fixing a boundary, "[w]e assume that the parties to the Compact were well aware of our precedent . . . ."); *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510, 512 (2d Cir. 1937), (Hand, L., J.) (where the time to appeal an order had not expired, a non-lawyer either "knew, or if he did not know, was charged with notice" that an order could be reversed on appeal and thus could not be relied upon); *Fed. Deposit Ins. Co. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991) (persons "are charged with knowledge of constitutional developments at the time of the alleged constitutional violations, including all available case law"). As seen in Point II, Petitioner is specifically charged with knowledge of its Article III right as established by this Court's precedent.

POINT II

SCHOR DEMONSTRATES THAT PETITIONER'S KNOWLEDGE OF ITS ARTICLE III RIGHT IS CONCLUSIVELY PRESUMED FROM ITS DEEMED KNOWLEDGE OF CASE LAW

Significantly, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), a party's knowledge of its Article III option was predicated on its presumptive knowledge of case law cited by this Court in its opinion, not on evidence of actual knowledge of an Article III court option. *Id.* at 849. The *Amici* urge this Court likewise to hold in the present case that, even if Petitioner did not consciously understand that it had an Article III right, it is presumed to have known that under the law, as pronounced by this Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), a fraudulent conveyance claim is a private right governed by Article III, rather than a public right excluded from the judicial power of the United States. *Granfinanciera* is analyzed in Point III *infra*.

This Court found in *Schor* that a person may know that it has an Article III right not only on the basis of actual knowledge of the right, but also on the basis of knowledge such person is presumed to know from case law that informs it of such right. In *Schor*, this Court held that a party was conclusively presumed to know that it had an option for an Article III court based on case law cited by the Court, which it elected to forgo in preference to litigating the claim before a federal administrative agency. *Schor*, 478 U.S. at 849.

There is no evidence that the objecting party in *Schor* had actual knowledge of his Article

III option. Petitioner nevertheless erroneously relies on *Schor* for the proposition that "full knowledge" is required for consent to a non-Article III adjudication. Pet'r's Br. 40. Petitioner missed the crux of *Schor* by failing to understand that *Schor* turned on imputed knowledge of the law, not actual knowledge. The crucial point of *Schor* is that the party's "full knowledge" of its Article III option was not actual knowledge, but instead consisted of presumptive knowledge imputed to such party from two decisions cited by the Court informing him that he had a private right of action that could have been adjudicated in an Article III court. *Schor*, 478 U.S. at 849–50.

Schor treated presumed knowledge as equivalent to "full knowledge" of an option to have the issue determined in a "federal Article III court." *Id.* at 850. The critical point for which *Schor* stands is that because presumptive knowledge of a party's Article III right is equivalent to actual knowledge of such right, presumptive knowledge constitutes a basis for "an effective waiver." *Id.* at 849. In the present case, Petitioner's presumptive knowledge of the case law gave it sufficient knowledge and awareness of an Article III right. Its litigation of the fraudulent conveyance action in the bankruptcy court, without asserting an Article III objection, thus constituted implied consent to adjudication of the claim by the bankruptcy court or an implied waiver of its Article III right.

POINT III

THERE WERE MULTIPLE PRE-STERN COURT HOLDINGS THAT A FRAUDULENT CONVEYANCE ACTION IS A PRIVATE RIGHT FOR ARTICLE III PURPOSES. PETITIONER DID NOT NEED *STERN* TO LEARN IT HAD AN ARTICLE III RIGHT

There were several pre-*Stern* warnings that alerted Petitioner to its Article III right. Prior to this Court's decision in *Stern* and long before summary judgment was granted in this case, this Court's decision in *Granfinanciera* established that Petitioner had a sound basis to assert an Article III right to a district court adjudication of the fraudulent conveyance action at issue. Similarly, the Ninth Circuit's 2010 decision in *Marshall v. Stern*, also issued before summary judgment was granted, signaled prior to *Stern* that a fraudulent conveyance defendant had the right to an Article III court's determination. *See Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037, 1054 n. 23 (9th Cir. 2010), *aff'd*, 131 S. Ct. 2594 (2011). Lastly, Petitioner's pleadings indicate it was aware that it had a right to an Article III court's adjudication. *See* Point IV.

A. This Court's Decision in *Granfinanciera* Established Petitioner's Article III Right

This Court held in *Granfinanciera* that fraudulent conveyance actions do not fall within the public rights doctrine. Looking to the lines drawn by past Article III precedent, *Granfinanciera* made clear that such actions only assert private, rather than public rights. *Granfi-*

nanciera, 492 U.S. at 53–54. This Court there resolved that "a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55. This is because fraudulent conveyance actions "are quintessentially suits at common law that more nearly resemble state-law contract claims brought . . . to augment the bankruptcy estate . . . ." *Id.* at 56. This Court left no doubt as to its view of the character of fraudulent conveyance claims for Article III purposes, reiterating that fraudulent conveyance claims "appear matters of private rather than public right." *Id.*

This Court in *Granfinanciera* then carefully noted the importance of its view that a fraudulent conveyance claim is a private right, pointing out that prior to its decision in that case, the only potential basis for exempting fraudulent conveyance claims from Article III might have been under the long-established public rights exception. This Court, however, rejected that possibility, concluding in *Granfinanciera* that because a right to recover a fraudulent conveyance "is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court . . . ." *Id.* at 53 (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

Indeed, Petitioner itself cites *Granfinanciera* in support of its acknowledgment that "the fraudulent conveyance claims asserted against [Petitioner] do not qualify as public rights." Pet'r's Br. 30 n. 2. Moreover, this Court in *Stern*,

upon which Petitioner heavily relies, pointed out, in buttressing its holding that a tort counterclaim is a private right, that in *Granfinanciera* this Court "*rejected* a bankruptcy trustee's argument that a fraudulent conveyance action filed . . . against a noncreditor in a bankruptcy proceeding fell within the [public rights] exception." *Stern v. Marshall*, 131 S. Ct. 2594, 2598 (2011) (emphasis added). In resolving the tort counterclaim issue in *Stern*, this Court left no doubt as to its understanding of *Granfinanciera* by concluding that "Vickie's counterclaim – like the fraudulent conveyance claim at issue in *Granfinanciera* – does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Id.* at 2614. *Stern* thus did not create or establish a new Article III right for fraudulent conveyance defendants, but only reaffirmed *Granfinanciera*'s conclusion that a fraudulent conveyance claim is a private right within Article III, not a public right excluded from the judicial power. Petitioner has no excuse for not having acted upon the utterly clear lesson of *Granfinanciera* about fraudulent conveyance claims in bankruptcy proceedings. Its dredged-up protestation that it needed *Stern* to learn that lesson lacks credibility.

Petitioner's Article III objection was clearly established by binding case law issued by this Court long before *Stern*, which, as a basis for its own decision, relied on *Granfinanciera*'s holding that a fraudulent conveyance claim is a private rather than a public right. *Id.* Petitioner did not need *Stern* to know what *Granfinanciera* said so clearly. The only new knowledge that Petitioner may have gained from *Stern* was that a counter-

claim sounding in tort is a private right for Article III purposes. That holding and its supporting analysis, however, was not necessary for Petitioner to understand that it could make a sound Article III objection in the fraudulent conveyance case brought against it in the bankruptcy court. In this case, a fraudulent conveyance claim is at issue, not a counterclaim, so *Stern* only provides a link for a different chain. In sum, prior to *Stern*, Petitioner was warned that the fraudulent conveyance action asserted against it was a private right giving rise to an Article III objection.

B. Conscientious Review of this Court's Precedents in *Granfinanciera* and *Northern Pipeline* Would Have Alerted Petitioner to Its Article III Right. The Ninth Circuit's Erroneous Holding in *Mankin* Did Not Bar Petitioner's Assertion of the Right. Nor Was *Stern* an Intervening Change in Law

Petitioner and its *amici* also urge that its consent to the bankruptcy court's exercise of authority over this case could not have been "knowing and voluntary," claiming that binding Ninth Circuit precedent foreclosed making an Article III objection. Pet'r's Br. 44–46. That contention is devoid of merit. Because Petitioner had a strong basis for raising that objection based on this Court's precedent issued both before and after the asserted Ninth Circuit precedent, its reliance on the Ninth Circuit precedent as foreclosing such an objection is misguided.

To support that contention, Petitioner relies on *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987), arguing that, until that case was

overruled, fraudulent conveyances were public rights outside the scope of Article III under Ninth Circuit law, and that it was barred by such precedent from asserting an Article III objection. Such reliance, however, is flawed for two reasons: first, *Mankin* missed the point of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); and second, the holding in *Mankin* was clearly overruled two years later by *Granfinanciera*. *See* Point III.A. The court's holding in *Mankin* was based heavily on its conclusion that the court in that case "need not decide if this case neatly falls within the *Northern Pipeline* plurality's definition[] of . . . public rights," *Mankin*, 823 F.2d at 1306. *Mankin*, however, erroneously disregarded that *Northern Pipeline* required such a determination to be made. Instead, the court ignored the plurality's clear holding that "*only* controversies" involving public rights "may be removed from Article III courts and delegated to legislative courts or administrative agencies for their determination," *Northern Pipeline*, 458 U.S. at 70, a holding with which six Justices concurred. *See id.* at 91 (Rehnquist, J., concurring). Moreover, *Mankin*'s inconsistency with *Granfinanciera* is equally clear. The Ninth Circuit in *Mankin* based its holding on its conclusion that a fraudulent conveyance action was a public right because it "directly relate[d] to the restructuring of debtor-creditor relations and is not merely an action to bring property into the estate." *Mankin*, 823 F.2d at 1307. By sharp contrast, two years after *Mankin*, this Court's 1989 decision in *Granfinanciera* made it clear that a fraudulent conveyance does not involve such restructuring and "is more accurately characterized as a private rather than a public right." *Granfinanciera*, 492

U.S. at 34. The fact that litigants would have treated bankruptcy court determinations of fraudulent conveyance actions as routine and uncontroversial based on *Mankin* is not, as Petitioner argues, an acceptable excuse for disregarding *Granfinanciera's* later treatment of such claims as private rights for Article III purposes. Petitioner was bound to follow this Court's lead in *Granfinanciera*, not to accept the Circuit Court's erroneous *Mankin* decision.

Petitioner's reliance on *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775 (9th Cir. 2007), is also utterly misplaced. In that case, the objectant did not make any Article III objection, and the court did not even discuss Article III rights. Petitioner nevertheless urges that *Healthcentral* suggests that a bankruptcy court may, in the face of an Article III objection, adjudicate an avoidance claim by summary judgment in the absence of consent. The opinion in that case, however, provides no basis whatsoever for it to have any relevance to an Article III issue. Contrary to Petitioner's position, *Healthcentral's* allowance of summary judgment where a jury demand was made has no bearing on Article III. The Seventh Amendment and Article III diverge in regard to the summary judgment authority of a bankruptcy court. As explained in *Healthcentral*, a summary judgment motion is consistent with the right to a jury trial because a summary judgment motion merely addresses "whether trial is necessary at all," and no findings of fact are made where there is no genuine dispute as to any material fact. *Id.* at 787. By contrast, when there are no material facts in dispute, a summary judgment, as a dispositive

order, gives rise to an Article III right. Petitioner would simply have this Court read summary judgments, which are dispositive orders, out of Article III. Petitioner's reliance on *Healthcentral* flies in the face of this Court's Article III jurisprudence, which extends to all dispositive means for adjudicating a case, including summary judgment. Summary judgment motions, when decided, finally determine the rights of the litigants. *See* Fed. R. Bankr. P. 7056 (incorporating Fed. R. Civ. P. 56). This Court's "precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at *all* stages of adjudication . . . ." *Northern Pipeline*, 458 U.S. at 86 n. 39 (italics added).

Nor is Petitioner's argument to be credited that it may raise its Article III right for the first time on appeal because *Stern* was "an intervening change in law[.]" Pet'r's Br. 42. *Stern* cannot fairly be viewed as such a change in light of its express endorsement of *Granfinanciera's rejection* of a bankruptcy trustee's argument that a fraudulent conveyance claim fell within the public rights exception to Article III. *Stern*, 131 S. Ct. at 2598. *Granfinanciera* was no less available to Petitioner well in advance of the bankruptcy court's granting of summary judgment, than it was to this Court when it was deciding *Stern*. Petitioner simply did not need *Stern* to raise an objection based on Article III.

Moreover, the cases on which Petitioner relies to support its "intervening change in the law" contention are not on point. In *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143–44 (1967), the party, Curtis, had no way to raise a First

Amendment defense until this Court issued its decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), while Curtis's appeal was pending. In contrast, Petitioner's right under Article III was established by this Court's decisions in *Northern Pipeline* and *Granfinanciera* rendered long before the bankruptcy court's grant of summary judgment. Unlike *Curtis*, in which a precedent was issued while an appeal was pending, *Stern* was not a precedent that established Petitioner's Article III right. Rather, Petitioner's Article III right depended on much earlier decisions of this Court.

Petitioner's reliance on *Hawknet Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009), is equally unavailing. As in *Curtis*, the intervening change in that case, unlike the present case, established a new principle that was not guided by prior precedent of this Court. In that case, the Circuit Court allowed a party to support its argument on its appeal by relying upon a new Circuit Court opinion issued in a different case only after the district court's decision was rendered. When the case was before the district court, the Circuit Court's precedent in effect precluded a "new objection." *Id.* at 92. In overruling the earlier precedent, the new Circuit Court decision that surfaced during the appeal to the Circuit Court in *Hawknet*, unlike *Stern* in present case, was not based upon or foretold by prior law.[5] It is in

[5] It is clear from the discussion in *Hawknet*, that the newly surfaced Circuit Court decision in *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2009), was not guided by prior cases in overturning that court's own precedent set in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002).

this context that the *Hawknet* court noted, "the doctrine of waiver demands conscientiousness, not clairvoyance, from parties." *Id.* Conscientiousness is all the *Amici* suggest Petitioner needed in order to know that it had a well-founded Article III objection.

The *Amici* do not expect Petitioner to have been clairvoyant. Rather, their position is just that Petitioner should have been more "conscientious," *see id.*, in reviewing the state of the law regarding Article III and fraudulent transfer claims. Had it done so, it would have known that it had a strong basis for raising an Article III objection. Petitioner's election not to raise that objection should thus be considered both knowing and voluntary.

The *Amici* do not fault Petitioner "for failing to raise an argument before there was legitimate legal support for such an argument[,]" *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 516 (6th Cir. 2006), but rather fault Petitioner precisely because there *was* legitimate legal support for such an argument. Nor do they expect Petitioner to have "litter[ed its] pleadings with every argument which might conceivably be adopted during the pendency of a proceeding." *Id.* Petitioner's TOUSA *amici* likewise miss the point when they argue "Lawyers . . . – and their clients – should not be punished for keeping their creativity within the clear boundaries of existing law." TOUSA Br. 7. Rather than being punished for restraining their creativity, litigants would simply be held to the consequence of their decision not to argue for a change in the law when they have a sound basis for doing so. For this Court to hold otherwise would be to sanction the

free-riding of litigants on the possibility that unknown third parties make the argument for them. On the contrary, when case law on an important issue is erroneous, this Court should adopt a rule that encourages litigants and their lawyers to "[say] so – and [say] so promptly[.]" *Stern*, 131 S. Ct. at 2608, rather than waiting for resolution of the litigation of others.

C. The 2010 Decision of the Ninth Circuit in *Marshall v. Stern* Alerted Petitioner to Its Article III Right

The 2010 decision in *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010), decided by the Ninth Circuit before the bankruptcy court issued summary judgment against Petitioner, should also have alerted Petitioner to a right to an Article III adjudication of the fraudulent conveyance claim asserted against it. Prior to the summary judgment in this case, the Ninth Circuit held in *Marshall v. Stern* that a proceeding, although designated as "core" by 28 U.S.C. § 157(b)(2), raises an Article III issue if the proceeding, such as the one involved in the present case, involves a private right requiring an Article III court's determination. *Marshall v. Stern* thus signaled that, just as the counterclaim at issue in that case raised an Article III issue, the fraudulent conveyance claim in the present case, although also designated as "core," likewise raised an Article III issue. *Id.* at 1060. Significantly, the court cautioned that a broad interpretation of 28 U.S.C. § 157(b)(2) would run afoul of this Court's holding in *Northern Pipeline*. *Id.* at 1057.

The court in *Marshall v. Stern* acknowledged that the concept of core and non-core pro-

ceedings "has its roots in Justice Brennan's plurality" decision in *Northern Pipeline*. *Id.* at 1054 n.23 (citing *Northern Pipeline*, 458 U.S. at 71). In the plurality decision, Justice Brennan characterized the exercise "of the historically recognized judicial power" as those proceedings that assert private rights or "the liability of one individual to another . . . ." *Northern Pipeline*, 458 U.S. at 69–70. By holding in *Marshall v. Stern* that the counterclaim involved was non-core, the Ninth Circuit pointed out that the counterclaim sounding in tort did not implicate "the restructuring of debtor-creditor relations. . . ." *Marshall v. Stern*, 600 F.3d at 1054 (citing *Northern Pipeline*, 458 U.S. at 71). Instead, the tort claim there in suit was a claim that would have determined the liability of one individual to another and had to be determined by an Article III judge. This was a clear indication of a right to an Article III court's determination of other private right claims, including fraudulent conveyance claims, which likewise determine the liability of one individual to another and thus fall within Article III.

In sum, Petitioner had clear indications prior to this Court's decision in *Stern* of the Article III right to adjudication of a fraudulent conveyance claim. Petitioner's asserted need for *Stern* to know its Article III rights utterly lacks merit – nor did the Circuit Court precedent cited by Petitioner bar it from making an Article III objection so clearly established by this Court's precedent.

POINT IV

THERE IS EVERY INDICATION THAT PETITIONER WAS AWARE THAT IT COULD MAKE A SOUND ARTICLE III OBJECTION, BUT FAILED TO ASSERT IT. GAMESMANSHIP BY SILENCE SHOULD NOT BE ENCOURAGED

Petitioner's actions in the bankruptcy court indicate that it was aware of its Article III right. Its denials of the Respondent's allegations in the complaint initiating this action raise a strong inference that it knew that it had an Article III right. Even if Petitioner were not charged with knowledge of its Article III right because of the compelling prior case law, there is a strong indication that it had actual knowledge of its right, as well.

In his complaint, Respondent alleged, "This is . . . a 'core proceeding'" pursuant to 28 U.S.C. § 157 (b)(2)(H). J.A. 50, ¶ 2.1. Petitioner denied this allegation, J.A. 80, ¶ 2.1, even though § 157(b)(2) provides, "Core proceedings include . . . (H) proceedings to . . . recover fraudulent conveyances." Because Congress defined a fraudulent conveyance proceeding as a core proceeding, Article III was the only basis for Petitioner's denial of the allegation that this action was a core proceeding. Petitioner thus understood that it had an Article III right to object to an adjudication of this action by the bankruptcy court.

Petitioner also denied Respondent's allegation that the bankruptcy court could even hear this case. J.A. 50, ¶2.2; J.A. 80, ¶ 2.2.[6] This denial cannot

[6] Respondent's complaint states, "2.1 This is an action to recover estate property by avoiding preferential transfers, fraudulent transfers, imposing successor liability, equitably

be explained simply by noting that Petitioner believed the case was non-core, because Petitioner must have been aware that the bankruptcy court had statutory authority without the consent of the parties to hear, without adjudicating, a non-core proceeding pursuant to 28 U.S.C. § 157(c)(1). Understanding that the bankruptcy court could at least hear a non-core proceeding, which Petitioner believed this case to be, it nonetheless denied that the bankruptcy court had any authority even to hear this fraudulent conveyance case. That denial, then, must have been based on its understanding that it had an Article III right to require this case to be in the district court.

Indeed, it is not enough for Petitioner to point to the qualified language of its denial to avoid this conclusion. While it is true that Petitioner's precise language noted that legal conclusions do not require a response, it continued to say, "To the extent that a response is required, Defendant denies." J.A. 80, ¶ 2.1, ¶ 2.2. Whether or not the allegations of the complaint were legal conclusions, Bankruptcy Rule 7012(b) required a response. Bankruptcy Rule 7012(b) provides, "[A]

subordinating the claims of ARIS, EBIA, Palaveda, Ewing and Pearce, for conversion, for an accounting, for substantive consolidation and for breach of fiduciary duty and thus is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(B), (C), (E), (F), (H), and (O). 2.2 This Court has jurisdiction to hear this complaint pursuant to 28 U.S.C. §157(a) and (b), 1334(a) and (b), and 11 U.S.C. §§105, 510, 544, 547, 548, 550 and 551." Petitioner's answer states, "2.1 Paragraph 2.1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies. Paragraph 2.2 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies."

responsive pleading shall admit or deny an allegation that the proceeding is core or non-core." By denying that the proceeding was "core," Petitioner treated the claim as non-core, and thus was charged with knowledge of the further obligation under Bankruptcy Rule 7012(b) then and there either to state that it did consent to the entry of a final order, or that it refused to consent.

Although Petitioner asserted in its answer that the bankruptcy court could not hear the case, Petitioner did not, as Bankruptcy Rule 7012(b) requires, expressly refuse to consent to the bankruptcy court's adjudicatory authority, but instead kept its awareness of its Article III right to itself.[7] Throughout this litigation, Petitioner elected to forego numerous opportunities to bring its Article III objection to the surface. First, when it demanded a jury trial, it could have moved to withdraw the reference pursuant to 28 U.S.C. § 157(d) predicated on its Article III right. Second, after the bankruptcy court interpreted its demand for a jury trial as a motion to withdraw the reference, J.A. ¶ 102, Petitioner could have argued before the district court that Article III precluded the bankruptcy court from adjudicating the case. Instead, Petitioner stood mute as other defendants and Respondent submitted a status report to the district court stating that there were various matters, including a motion for summary judgment, remaining for the bankruptcy court to

[7] It is well established that, notwithstanding the express consent provision of Bankruptcy Rule 7012(b), consent may arise by implication from a party's litigation conduct during the proceeding. *See Roell v. Withrow*, 538 U.S. 580, 582 (2003) (holding that consent may be inferred from a party's conduct during litigation). *See also* cases cited in Point I.

determine. Pet'r's App. 73a. Third, after the proceeding returned to the bankruptcy court, Petitioner continued not to assert an Article III objection, just as it did not when the proceeding was first in that court. Fourth, after the Ninth Circuit announced its 2010 decision in *Marshall v. Stern*, Petitioner could have asked the bankruptcy court to consider the import of that decision on the summary judgment motion still pending before that court. Fifth, Petitioner could also have argued to the district court on its appeal from the summary judgment that the bankruptcy court lacked authority to adjudicate the case, but it did not until it made an Article III objection for the first time in a motion predicated on *Stern* that it filed in the Circuit Court below. The Petitioner did not need to know the holding in *Stern* in order to know its Article III rights from the inception of the proceeding. Petitioner had such knowledge from clear pre-*Stern* signals that alerted it. *See* Point III. In short, Petitioner waived its Article III personal right by failing to "[say] so – and [say] so promptly." *Stern*, 131 S. Ct. at 2608.

Petitioner now, as an afterthought, seeks to use Article III to void the judgment against it and to enjoy a brand new opportunity to defend against the fraudulent conveyance claim at issue, despite Petitioner's acknowledged awareness that "time and cost factors" are matters of serious concern to the proper and efficient functioning of the system for bankruptcy litigation. Pet'r's Br. 56. Petitioner's position, which it presses at significant cost to the estate and its creditors, is predicated squarely on this Court's decision in *Stern*, although it is clear that Petitioner did not need *Stern* to know that it had a sound Article III

objection on the basis of the unqualified proposition announced almost 25 years ago in *Granfinanciera* that a fraudulent conveyance claim is a private right for Article III purposes. *See* Point III.A.

Petitioner's argument should also fail because a ruling in its favor would promote gamesmanship. In *Stern*, this Court noted the perils of allowing litigants to "sandbag" the court with jurisdictional and constitutional issues after a substantial amount of litigation. *Stern*, 131 S. Ct at 2608 ("In such cases, as here, the consequences of 'a litigant . . . sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor,'— can be particularly severe.") (citing *Puckett v. United States*, 556 U.S. 129, 134 (2009)).

In any proceeding, the interests of finality and judicial economy are best served by requiring a litigant to raise its objections in its pleadings and surely before a court rules on a dispositive motion. Emphasizing the importance of finality, this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938): "It is just as important that there should be a place to end [a case] as that there should be a place to begin litigation. After a party has his day in court . . . [t]here is no reason to expect that the second decision [after a new hearing] will be more satisfactory than the first."

Moreover, this Court recognizes that finality is important to conserve judicial resources. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) (recognizing the importance of conserving judicial resources); *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 467 n.6 (1982) (same); *In re Owens Corning*, 419 F.3d 195, 203 (3d Cir. 2005)

(recognizing the "protracted nature" of bankruptcy cases and the need to avoid the waste of time and resources). The substantial "risk of a full and complicated [proceeding being] wasted at the option of an undeserving and possibly opportunistic litigant" weighs against the Petitioner. *See Roell*, 538 U.S. at 590. A rule allowing Petitioner first to raise its Article III rights after judgment has been issued against it is simply "not worth the downside." *Id.* (finding that inferring consent limits the possibility of gamesmanship). A party should not be allowed to impose added burdens on the judiciary, nor to add the expense of relitigating a case to the large cost of a bankruptcy case, while diminishing the estate and delaying distribution to the creditors, by remaining silent while preserving an Article III basis for upsetting a judgment if the case goes against it.

CONCLUSION

Based on the foregoing, and on the Respondent's Brief in Opposition, the order appealed from should be affirmed.

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Dated: November 12, 2013

AMICUS CURIAE BRIEF

No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY

Petitioners,

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether Article III of the Constitution permits a bankruptcy court to hear and determine matters outside of the bankruptcy court's constitutional authority upon a litigant's express or implied consent.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. Allowing Bankruptcy Courts To Hear, Determine, And Enter Final Orders And Judgments With Litigant Consent Does Not Violate Article III Of The Constitution. 6

A. The Court Has Historically Upheld The Ability Of Litigants To Waive The Right To An Article III Court. 6

B. In Similar Contexts, The Court Has Affirmed The Singular Significance Of Consent. 9

C. *Stern* Does Not Change The Constitutional Analysis. 11

II. The Ability Of Litigants To Consent To Final Adjudications By Non-Article III Tribunals Serves An Important Role In The Federal Court System 17

CONCLUSION 28

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Bell & Beckwith v. Internal Revenue Service,
766 F.2d 910 (6th Cir. 1985) 10

Cline v. Kaplan,
323 U.S. 97 (1944) 8

Collins v. Foreman,
729 F.2d 108 (2d Cir. 1984) 10

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986) ..... passim

D.L. Auld Co. v. Chroma Graphics Corp.,
753 F.2d 1029 (Fed. Cir. 1985) 10

Fields v. Washington Metropolitan Area Transit Authority,
743 F.2d 890 (D.C. Cir. 1984) 10

Frazin v. Haynes & Boone, L.L.P.,
732 F.3d 313 (5th Cir. 2013) 12, 13

Gairola v. Virginia Department of General Services,
753 F.2d 1281 (4th Cir. 1985) 10

Geras v. Lafayette Display Fixtures, Inc.,
742 F.2d 1037 (7th Cir. 1984) 10

Goldstein v. Kelleher,
728 F.2d 32 (1st Cir. 1984) 10

Gonzalez v. United States,
553 U.S. 242 (2008) 6

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 14, 15

Katchen v. Landy,
382 U.S. 323 (1966) 14

Langenkamp v. Culp,
498 U.S. 42 (1990) 14

Lehman Brothers Kuhn Loeb Inc. v. Clark Oil & Refining Corp.,
739 F.2d 1313 (8th Cir. 1984) 10

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 12

MacDonald v. Plymouth County Trust Co.,
286 U.S. 263 (1932) 6, 7, 8

Miller v. Fenton,
474 U.S. 104 (1985) 4

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 2, 4, 8

Orsini v. Wallace,
913 F.2d 474 (8th Cir. 1990) 10

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.,
725 F.2d 537 (9th Cir. 1984) 10, 17

Peretz v. United States,
501 U.S. 923 (1991) 9, 24

Puryear v. Ede's Ltd.,
731 F.2d 1153 (5th Cir. 1984) 10

Roell v. Withrow,
538 U.S. 580 (2003) 6, 9, 26, 27

Stern v. Marshall,
131 S. Ct. 2594 (2011) ..... passim

Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.,
673 F.3d 399 (5th Cir. 2012) 10

Thomas v. Union Carbide Agricultural Products Co.,
473 U.S. 568 (1985) 8

Wellness International Network, Ltd. v. Sharif,
727 F.3d 751 (7th Cir. 2013) 23

Wharton-Thomas v. United States,
721 F.2d 922 (3rd Cir. 1983) 10

STATUTES

28 U.S.C. § 157(a) 14

28 U.S.C. § 157(b)(2)(E) 26

28 U.S.C. § 157(c) 15, 16

28 U.S.C. § 157(d) 14

28 U.S.C. § 1334 14

OTHER AUTHORITIES

Fed. R. Bankr. P. 7001(1) 23

Fed. R. Bankr. P. 7008(a) 26

Fed. R. Bankr. P. 8001(a) 15

Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121 (2012) 7, 15

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1 Collier on Bankruptcy (16th ed. 2011) 15

Brief of United States as Amicus Curiae, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179), 2010 WL 4717271 16

INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") submits this brief in support of Respondent, and respectfully urges the Court to conclude that permitting bankruptcy courts to hear, determine, and enter final orders and judgments with litigant consent does not violate Article III of the United States Constitution.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include attorneys in law firms, corporations, non-profit organizations, and state and federal governments. Members also include judges, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including those protected by Article III. Because this

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

Court's precedent teaches that there is no constitutional harm that arises when litigants consent to have their claims heard by non-Article III courts and there are real, practical benefits to the federal court system when litigants consent to proceed in such forums, the ABA urges this Court to continue to permit litigants to consent to adjudication of their claims by non-Article III bankruptcy courts.

The ABA's support of the bankruptcy courts is long-standing. In 1978, for example, the ABA formed the Task Force on Revision of the Bankruptcy Laws, and in 1983, following this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the ABA adopted a policy urging Congress to provide for party consent to bankruptcy court adjudications.[3]

In 2013, following this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the ABA adopted a policy that supports the authority of bankruptcy judges:

> upon the consent of all the parties to the proceeding, to hear, determine, and

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[3] ABA Policy # 303 (adopted February 1983), available from the ABA archives. The ABA adopts policies by vote of the ABA's House of Delegates ("HOD"). Today, the HOD includes more than 560 delegates representing states and territories, state and local bar associations, affiliated organizations, and ABA sections and divisions. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

> enter final orders and judgments in those proceedings that, while they may be among those designated as 'core' within the meaning of 28 U.S.C. § 157(b), may not otherwise be heard and determined by a non-Article III tribunal absent the parties' consent, as being consistent with and not violative of Article III of the United States Constitution.[4]

This brief sets forth the legal and practical analysis on which this ABA policy is based.

SUMMARY OF THE ARGUMENT

The ABA submits that the holding of *Stern v. Marshall*, 131 S. Ct. 2594 (2011) should not be extended to eliminate the ability of litigants to consent to adjudications by bankruptcy and other

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[4] ABA Policy # 109 (adopted February 2013), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_109.docx. In addition, concerned that *Stern* might be seen as calling into question the constitutionality of the consent provisions of the Federal Magistrates Act, 28 U.S.C. § 636(c)(1), the ABA adopted similar policy supporting that Act's grant to magistrate judges "upon the consent of the parties, the power to conduct any and all proceedings in a jury or non-jury civil matter in federal court and to order the entry of judgment in the case, as being consistent with and not violative of Article III of the United States Constitution." ABA Policy # 10B (adopted February 2012), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_10b.doc.

non-Article III courts. *Stern* held only that a creditor did not consent to be sued in bankruptcy court on a state law claim merely by filing a proof of claim in the bankruptcy case. *Id.* at 2614-15. In a situation where a litigant has *not* consented, *Stern* held, as a plurality of the Court did in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), that Article III precluded the bankruptcy court from entering a final judgment on a state law claim that did not "stem[] from the bankruptcy itself" and which would not "necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618.

During the thirty-one years since *Northern Pipeline*, the Court has held in other analogous contexts that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986). The argument that, following *Stern*, litigants can no longer consent to having non-Article III courts decide their claims runs contrary to this precedent and to the Court's statement that its holding in *Stern* was "narrow." 131 S. Ct. at 2620. It also contradicts the principle that "'courts should not lightly overrule past decisions.'" *See Miller v. Fenton*, 474 U.S. 104, 115 (1985) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970)).

If accepted, this argument also would strip bankruptcy courts of adjudicative powers they have held since Congress enacted the modern Bankruptcy Code and force that work upon the district courts' already very crowded dockets. As demonstrated by the 1,107,699 bankruptcy cases filed in the year ending September 30, 2013, "the volume of bankruptcy cases is staggering." *Stern*, 131 S. Ct. at 2630 (Breyer, J., dissenting).[5] The number of adversary proceedings is equally high. As of September 30, 2012, 65,599 adversary proceedings were also pending in the bankruptcy courts.[6]

To illustrate the impact on the district courts and litigants if bankruptcy courts may no longer hear and determine fraudulent transfer, preference, and state-law counterclaims with litigant consent, or recommend proposed rulings in those proceedings, the ABA gathered case filing data from the CM/ECF system for a sample district from each circuit for the four year period of July 1, 2009 through June 30, 2013. As demonstrated in the ABA's chart summarizing that analysis, *see infra* at 21-22, those eleven district courts would have been required to hear and decide at least 37,639 additional cases. Spread out over the entire federal court system, the shift in work load would be significant.

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[5] http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0913_f2.pdf.

[6] http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F08Sep12.pdf.

This Court predicted in *Stern* that its ruling would not "meaningfully change[] the division of labor" between the district courts and bankruptcy courts under 28 U.S.C. § 157. 131 S. Ct. at 2620. The ABA respectfully submits that, consistent with this Court's prediction in *Stern*, and its established precedent in bankruptcy and analogous contexts, the Court should conclude that bankruptcy and other non-Article III courts may continue to hear and determine matters with litigant consent.

ARGUMENT

I. Allowing Bankruptcy Courts To Hear, Determine, And Enter Final Orders And Judgments With Litigant Consent Does Not Violate Article III Of The Constitution.

A. The Court Has Historically Upheld The Ability Of Litigants To Waive The Right To An Article III Court.

This Court has consistently upheld the authority of non-Article III tribunals, with the consent of the litigants, to hear any and all proceedings in bankruptcy or other civil cases, and to order the entry of judgment. *See, e.g.*, *Gonzalez v. United States*, 553 U.S. 242, 252 (2008); *Roell v. Withrow*, 538 U.S. 580, 586-87 (2003); *Schor*, 478 U.S. at 848; *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 268 (1932). As the Court explained in *Schor*, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. Moreover, as a personal

right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." 478 U.S. at 848-49 (citations omitted). In *Schor*, the Court rejected the argument that allowing a litigant to file a state law counterclaim in a CFTC reparation proceeding created a "substantial threat to the separation of powers," *id.* at 854, recognizing that such concerns are diminished when "the decision to invoke [the non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected." *Id.* at 855.

The singular importance of consent to the constitutional analysis runs through the relevant authorities. The Bankruptcy Act of 1898 authorized bankruptcy referees to hear and decide summary matters incident to the administration of the bankrupt's estate and to adjudicate creditors' claims against the estate, but did not authorize those referees to hear and decide plenary suits to recover money for the estate. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 128-29 (2012).

In *MacDonald*, a case decided under the 1898 Act, the Court held that litigants could waive the right to have a plenary suit, like the fraudulent transfer action at issue here, heard by an Article III court.

286 U.S. at 268. In *Cline v. Kaplan*, 323 U.S. 97, 99 (1944), also decided under the 1898 Act, the Court held that "[c]onsent to proceed summarily may be formally expressed" or "may be waived by failure to make timely objection."

When the Court addressed the constitutionality of the jurisdictional provisions of the Bankruptcy Reform Act of 1978 in *Northern Pipeline*, 458 U.S. 50, consent continued to be a determinative factor in the Court's analysis. In commenting on the plurality decision, both the concurring and dissenting opinions emphasized that the defendant Marathon had not consented to having an Article I court decide the debtor's breach of contract action against it. *Id.* at 89-90, 92.

In *Schor*, the Court reinforced that point, explaining that "the absence of consent" in *Northern Pipeline* was "a significant factor" in the Court's decision that "Article III forbade" the adjudication of Northern Pipeline's breach of contract action against Marathon in the bankruptcy court. 478 U.S. at 849. In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), the Court described *Northern Pipeline* as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." (emphasis added).

B. In Similar Contexts, The Court Has Affirmed The Singular Significance Of Consent.

In the analogous context of magistrate judges, the Court in *Roell* again emphasized the singular significance of consent, holding that a magistrate judge may enter a final judgment with the consent of the parties and that such consent may be express or implied. 538 U.S. at 589-91. The *Roell* Court held that, by allowing magistrate judges to hear and determine matters where consent is inferred, "[j]udicial efficiency is served; the Article III right is substantially honored." *Id.* at 590. *See also Peretz v. United States*, 501 U.S. 923, 936 (1991) (no constitutional infirmity in the delegation of felony trial jury selection to a magistrate judge with litigant consent).

Consistent with *Roell* and *Peretz*, the eleven circuit courts to address the issue have held that it is constitutionally permissible for magistrate judges to enter final judgments in civil proceedings based on the parties' consent.[7] As the Fifth Circuit recently explained, the Federal Magistrates Act was "'saved from any constitutional infirmity by its requirement that all parties consent. . . .'" *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, 673 F.3d 399, 405 (5th Cir. 2012) (quoting *Puryear*, 731 F.2d at 1154).[8]

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[7] *See, e.g., Orsini v. Wallace*, 913 F.2d 474, 479 (8th Cir. 1990) (upholding constitutionality of magistrate judge's entering final orders with consent of the parties); *Bell & Beckwith v. Internal Revenue Service*, 766 F.2d 910, 912 (6th Cir. 1985) (same); *Gairola v. Va. Dep't of Gen. Services*, 753 F.2d 1281, 1284-85 (4th Cir. 1985) (same); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (Fed. Cir.) (same); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894 (D.C. Cir. 1984) (same); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1315 (8th Cir. 1984) (same); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041-42 (7th Cir. 1984) (same); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984) (same); *Collins v. Foreman*, 729 F.2d 108, 119 (2d Cir.) (same); *Goldstein v. Kelleher*, 728 F.2d 32, 35-36 (1st Cir.) (same); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 542-43 (9th Cir. 1984) (*en banc*) (same); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3rd Cir. 1983) (same).

[8] *See also* ABA Policy 109 (adopted Feb. 11, 2013), Report at 6-7 (significant legislative purposes for delegating adjudicative authority to magistrate judges—including providing less formal, more efficient, and less expensive means of resolving civil controversies in a single forum—apply equally in the bankruptcy context), available at http://www.americanbar.org/

C. *Stern* Does Not Change The Constitutional Analysis.

Stern does not hold that parties may no longer consent to non-Article III adjudications. In *Stern*, the Court addressed the issue of waiver in two contexts and reached different conclusions based on the facts, thereby demonstrating that *Stern's* focus was not on whether consent is constitutionally permissible, but on what constitutes consent to a non-Article III adjudication. 131 S. Ct. at 2614-18.

In *Stern*, the creditor, E. Pierce Marshall ("Pierce"), never expressly consented to being sued in the bankruptcy court and objected to the bankruptcy court entering a final judgment on the debtor Vickie Lynn Marshall's ("Vickie") state law counterclaim against him both before and after the bankruptcy court ruled against him. *Id.* at 2601-02. The Court rejected the argument that Pierce had consented to being sued in bankruptcy court merely by filing a proof of claim against Vickie, and held that the subpart of the statute which authorized the bankruptcy court to enter a final judgment on Vickie's state law counterclaim, 28 U.S.C. §157(b)(2)(C), without Pierce's consent, was unconstitutional "in one isolated respect." 131 S. Ct. at 2620.

The Court reached the opposite conclusion when Pierce gave his consent. Pierce told the bankruptcy

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content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_109.docx.

court that he was "happy to litigate his claim" against Vickie in the bankruptcy court. 131 S. Ct. at 2597. The Court held that Pierce's consent waived the right to trial in an Article III court on his claim against Vickie even though the subsection at issue with respect to Pierce's claim, Section 157(b)(5), provides that the district court "shall order" claims like Pierce's tried in the district court. 131 S. Ct. at 2606-08; *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (holding the use of the word "shall" connotes a mandatory action).

The juxtaposition of the Court's determination that Pierce's consent allowed the bankruptcy court to enter judgment on Pierce's claim against Vickie with its determination that Pierce's lack of consent prevented Vickie from having the bankruptcy court enter judgment on her state law counterclaim against Pierce demonstrates that *Stern* did not eliminate the ability of litigants to consent to determinations by non-Article III courts. Instead, *Stern* held only that when a creditor files a proof of claim he does not consent to being sued on a state law counterclaim in the bankruptcy court unless resolution of the proof of claim will resolve the counterclaim. 131 S. Ct. at 2620.

The ABA submits that those circuit courts that have read *Stern* to hold that parties can no longer consent to non-Article III adjudications have incorrectly interpreted *Stern's* discussion of the structural importance Article III plays in our "system of separated powers." *See, e.g., Frazin v.*

Haynes & Boone, L.L.P., 732 F.3d 313, 320 n.3 (5th Cir. 2013) (quoting *Stern*, 131 S. Ct. at 2620). But *Stern's* discussion should be considered in the context of its facts: Pierce had not consented to being sued in bankruptcy court and had affirmatively objected. Pierce's refusal to consent to a bankruptcy court adjudication of the claims against him distinguishes *Stern* from *Schor*, and resulted in the Court's conclusion in *Stern* that Article III was violated. 131 S. Ct. at 2614.

The Court's conclusion in *Stern* that structural concerns predominated in the absence of consent, however, does not mean that those structural concerns preclude hearing, determination, and final judgment in an Article I tribunal when the parties give their consent. The Court recognized in *Stern* that "the structural principles secured by the separation of powers protect the individual as well." 131 S. Ct. at 2609. Thus, Article III's dual protection of both the individual and structural separation of powers concerns, recognized in *Schor*, remains the law post-*Stern*. Moreover, as the Court concluded in *Schor*, "separation of powers concerns are diminished" and litigants may waive the right to an Article III court, when "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" is unaffected. *Schor*, 478 U.S. at 855.

Under the statutes relevant to the bankruptcy courts, "the power of the federal judiciary to take jurisdiction," even in matters where the parties

consent to proceed in the bankruptcy court, is unaffected. *Id.* The jurisdictional statute, 28 U.S.C. § 1334, vests jurisdiction in the district courts over all bankruptcy cases and civil proceedings arising under title 11, or arising in or related to a bankruptcy case. The district courts also have complete discretion when deciding under 28 U.S.C. § 157(a) whether to refer a case or adversary proceeding to the bankruptcy court and under 28 U.S.C. § 157(d) whether to withdraw the reference of a matter previously referred to the bankruptcy court. Thus, the "power of the federal judiciary to take jurisdiction" in bankruptcy cases and adversary proceedings is preserved, making consent the determinative factor in the constitutional analysis. *Schor*, 478 U.S. at 855.

The conclusion that *Stern* did not eliminate the right of litigants to consent to non-Article III adjudications also is consistent with the Court's reliance in *Stern* on its precedent addressing Seventh Amendment jury trial rights in bankruptcy cases. *See Stern*, 131 S. Ct. at 2618 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52-56 (1989), *Langenkamp v. Culp*, 498 U.S. 42, 43 (1990) (*per curiam*), and *Katchen v. Landy*, 382 U.S. 323 (1966)). In *Granfinanciera*, the Court equated the right to trial by jury with the right to trial by an Article III court, stating that "if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the

question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." 492 U.S. at 53. *Stern* adopts the *Granfinanciera* analysis and the two decisions together stand for the proposition that if a litigant has a right to trial by jury, he also has the right to be heard in an Article III court. *See* R. Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 150-51 (2012) (explaining that *Stern* and *Granfinanciera* equate the right to a trial by jury to the right to an Article III court). Because the Court has recognized in this Seventh Amendment precedent that a party may waive its right to trial by jury in the bankruptcy context, *see Stern*, 131 S. Ct. at 2618, it should follow that a party similarly should be entitled to waive its right to have a judgment entered by an Article III court when the constitutional analysis that *Stern* requires leads to the conclusion that the bankruptcy court may not otherwise be entitled to enter a final judgment order.

Moreover, like the Federal Magistrates Act, Section 157(c) also provides an effective means for litigants entitled to an Article III court to consent to the bankruptcy court's entry of a final judgment. 28 U.S.C. § 157(c); *see also* Fed. R. Bankr. P. 8001(a). "The inspiration for 28 U.S.C. § 157(c)(2) is 28 U.S.C. § 636(c)(1), which deals with the powers of United States magistrate judges in like situations." 1 Collier on Bankruptcy ¶ 3.03[4] (16th ed. 2011). In *Stern*, the Court explained that the remedy for the

constitutional violation was the "the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction. . . ." 131 S. Ct. at 2620.[9] Because Section 157 divides the universe of claims into only two categories, those that are core and those that are not, by "remov[ing]" Vickie's counterclaim from the bankruptcy court's core authority, the Court necessarily classified that counterclaim into the only other class of matters recognized under Section 157, those that are non-core. 131 S. Ct. at 2620. Thus, Section 157(c) applies and provides litigants with an effective means to consent to final adjudication by the bankruptcy court or absent such consent, allows for the bankruptcy court to enter proposed findings of fact and conclusions of law subject to *de novo* review in the district court.

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[9] The Court stated that the "removal" of Vickie's counterclaim from the bankruptcy court's authority to enter a final judgment would not "meaningfully change[] the division of labor in the current statute; we agree with the United States that the question presented here is a 'narrow' one." 131 S. Ct. at 2620 (Citing United States as *Amicus Curiae* at 23). The United States' position, with which the Court agreed, was that "[t]he narrow constitutional question presented is whether Congress, consistent with Article III, could authorize the bankruptcy judge to enter final judgment on petitioner's counterclaim (subject to appellate review as provided in 28 U.S.C. § 158) *rather than simply submitting proposed findings and conclusions to the district court.*" *See* Brief of United States as *Amicus Curiae* at 23, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179), 2010 WL 4717271 (emphasis added).

II. The Ability Of Litigants To Consent To Final Adjudications By Non-Article III Tribunals Serves An Important Role In The Federal Court System.

Contrary to the Court's prediction in *Stern* that its ruling would "not change all that much," 131 S. Ct. at 2620, the ABA asserts that there would be a sea change in the division of labor between the bankruptcy courts and the district courts if parties are no longer able to consent to bankruptcy courts hearing and deciding fraudulent transfer claims or any other matters which are held to be core but outside of the bankruptcy court's constitutional power to adjudicate. The ABA submits that where such a change is not constitutionally required, judicial economy and practicality should be considered. "The idea of separation of powers is justified by eminently practical considerations. It is [therefore] faithful to the idea of separation of powers to examine the real consequences of the statute." *Pacemaker Diagnostic Clinic*, 725 F.2d at 546-47 (citing The Federalist No. 51 (J. Madison) at 349 (J. Cooke ed. 1962)).

The consequences of eliminating consent would be stark. Statistics compiled by the Administrative Office of the United States Courts demonstrate that the district courts are stressed and without adequate resources.[10] In 2012, 66 of the 677 authorized district court judgeships remain unfilled (approximately 10%).[11] Seventeen of those positions had been open for more than 18 months.[12] As a result of these vacancies, the district courts experienced 28 judicial emergencies in 2012.[13] To help ease the burden on authorized judges, 354 senior United States district court judges with staff also served the Judiciary.[14] District court judges handled a total of 382,068 pending civil and criminal cases, resulting in civil filings per authorized judgeship of 411 cases (up 10%

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[10] *See also*, October 29, 2013, Letter from Thomas M. Susman, Director, ABA Governmental Affairs Office, to Hon. Robert W. Goodlatte, Chair, Committee on Judiciary, U.S. House of Representatives (urging that Congress has an obligation to provide the federal judiciary with resources, in both judges and funds, needed to carry out its constitutional and statutory duties), available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013oct29_judgeshiph_l.authcheckdam.pdf.

[11] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/status-article-iii-judgeships.aspx.

[12] *Id.*

[13] A judicial emergency is either "a vacancy of any duration where weighted filings per judgeship are in excess of 600; or any vacancy longer than 18 months in a district court with weighted filings between 430 and 600 per judgeship; or any vacancy in a district court with more than one authorized judgeship and only one active judge." *Id.*

[14] *Id.*

from 2008) and weighted filings per authorized judgeship of 520 cases (also up 10% from 2008).[15]

The district courts' already heavy workload currently is lessened by the Judiciary's reference of title 11 matters to bankruptcy courts. As of 2012, 334 bankruptcy judges and 38 retired bankruptcy judges heard the 1,107,699 bankruptcy petitions filed in the twelve months preceding September 30, 2013 and the 65,599 adversary proceedings that were pending as of September 30, 2012.[16] If this Court concludes that bankruptcy courts lack the ability to hear adversary proceedings involving matters that are denominated as core but where those courts may not constitutionally enter judgment, or issue proposed findings of fact and conclusions of law in those cases, the resulting shift to the district courts will substantially increase their work load.

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[15] "Weighted filings statistics take into account the different amounts of time it takes a judge to resolve various types of civil and criminal actions.... The average civil case or criminal defendant each receives a weight of approximately 1.0. For more time-consuming cases, higher weights are assessed." http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx.

[16] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/status-bankruptcy-judgeships.aspx; http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0913_f2.pdf; http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F08Sep12.pdf.

To demonstrate the impact on the district courts, the ABA gathered case filing data from the CM/ECF system for a sample district from each circuit. By searching under the "Nature of Suit," the ABA was able to determine the number of adversary proceedings filed during the four-year period from July 1, 2009 through June 30, 2013 that included fraudulent transfer, preference and state-law based claims.[17] The ABA then compared that number to the total number of civil proceedings filed in the applicable district during the same four-year period and calculated the percentage increase in the district courts' civil case load that would result if all fraudulent transfer, preference, and state-law based adversary proceedings were withdrawn to the district courts.

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[17] The ABA searched using the following queries: "Recovery of money/property – 548 fraudulent conveyance", "Recovery of money/property – 547 preference", and "Other (e.g. actions that would have been brought in state court if unrelated to bankruptcy)."

The following chart summarizes that analysis:

Court	§548 & §544	§547	St. Law	*Total*	Dist. Ct./ % Inc.[18]
1st Cir. (D. Mass.)	147	370	126	643	11,996 *5.36%*
2d Cir. S.D. N.Y.)	1,029	5,951	221	7,201	40,078 *17.97%*
3d Cir. (D. Del.)	973	12,189	112	13,274	6,232 *213.00%*
4th Cir. (E.D. Va.)	185	1,221	70	1,476	13,418 *11.00%*
5th Cir. (N.D. Tex.)	188	731	82	1,001	23,018 *4.35%*
6th Cir. (E.D. Mich.)	360	1,656	92	2,108	23,368 *9.02%*

[18] http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf&page=1/district-fcms-profiles-june-2013.pdf&page=1; http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManagementStatistics_Archive.aspx.

Court	§548 & §544	§547	St. Law	*Total*	Dist. Ct./ % Inc.
7th Cir. (N.D. Ill.)	402	1,842	71	2,315	38,912 *5.95%*
8th Cir. (D. Minn.)	363	1,257	32	1,652	15,885 *10.40%*
9th Cir. (C.D. Cal.)	1,138	3,112	227	4,477	59,273 *7.55%*
10th Cir. (D. Col.)	191	845	101	1,137	13,346 *8.52%*
11th Cir. (M.D. Fla.)	970	1,174	211	2,355	31,512 *7.47%*

The ABA's analysis necessarily underestimates the potential impact on the district courts for three reasons. *First*, a broad reading of *Stern* is likely to lead to matters in addition to fraudulent transfer, preference, and state law counterclaims being deemed outside of the bankruptcy court's constitutional authority to enter a final judgment. The Seventh Circuit, for example, recently held that a bankruptcy court could not constitutionally decide an action seeking a declaration against the debtor

that certain property was property of the bankruptcy estate under 11 U.S.C. § 541. *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 774-76 (7th Cir. 2013). The foregoing analysis does not capture a matter of this type that typically would be brought by a motion filed in the bankruptcy case itself, outside of the adversary proceeding context, *see* Fed. R. Bankr. P. 7001(1), and for which no readily-obtainable data from the CM/ECF system is available.[19]

Second, the chart reflects only a snapshot in time. A large liquidating chapter 11 case can generate a significant number of adversary proceedings that may pend for many years. In 2010, for example, a

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[19] If allowed to stand, the holding in *Wellness* will impact the district courts' workloads in two significant ways. First, it would expand *Stern's* "narrow" holding in an unprecedented manner to include actions against a debtor to determine what is property of the estate, a determination which historically has always been viewed as "stem[ing] from the bankruptcy itself," and under a "narrow" reading of *Stern* would be within the bankruptcy court's constitutional authority to decide. 131 S. Ct. at 2618, 2620; *see* Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 607-09 (1998) (explaining the historical authority of bankruptcy commissioners to determine what is property of the bankrupt). Second, under *Wellness*, if a matter is denominated as core but outside of the bankruptcy court's constitutional authority, the matter must be heard entirely in the district court. 727 F.3d at 776-77. The combined impact of these two rulings, which is not captured in the chart, would exponentially increase the number of motions and adversary proceedings that will have to be heard entirely in the district court.

trustee in a case pending in the District of Minnesota filed 203 such adversary proceedings, and as of the filing of this brief, 123, or 59.7% of those adversary proceedings, remain pending.[20]

Third, a holding that litigants may not consent to proceed before non-Article III courts may include in its sweep matters now heard by magistrate judges, who "account for a staggering volume of judicial work" and are "indispensable." *Peretz*, 501 U.S. at 928 & n.5 (1991) (*citing Gov't of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3rd Cir. 1989)). In 2012, for example, magistrate judges disposed of 1,068,153 matters, including 15,049 civil cases concluded with finality by motion, jury trial, or bench trial *with litigant consent*.[21] As of 2012, the United States had 573 magistrate judges and 67 recalled retired magistrate judges, who provide substantial assistance to the 1020 active and senior status district court judges.[22]

The impact of eliminating consensual non-Article III adjudications is further demonstrated by these specific examples: a trustee in the case *In DBSI, Inc., et al.* (Case No. 08-12687), pending in the United States Bankruptcy Court for the District of Delaware, filed 885 fraudulent transfer and

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[20] https://ecf.mnb.uscourts.gov/cgi-bin/qryAscCases.pl?298823.

[21] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-magistrate-judges.aspx.

[22] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/appointments-magistrate-judges.aspx#table13.

preference actions in 2010.[23] Among the four district court judges in that district, during 2010, there were 1,595 civil cases pending; thus, if all of the fraudulent transfer and other avoidance actions had been transferred to one or more of the district court judges, their civil workload would have been increased by approximately 55.49%.[24] Similarly, a trustee in a case in the District of New Mexico, *In re Vaughan Company, Realtors*, (Case No. 10-10759), filed 168 fraudulent transfer and preference complaints in 2012.[25] That District had 1,085 civil matters pending at the end of 2012; thus a transfer to the district court of these 168 adversary proceedings would increase that district court's civil case load by 15.48%.[26] Additionally, in a pending case in the Eastern District of Washington, *In re LLS America LLC* (Case No. 09-06194), the liquidating trust filed 226 fraudulent transfer and preference actions in 2012.[27] Again, in the absence of

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[23] To compile this number and the other individual case numbers, the ABA reviewed the adversary complaints filed in these bankruptcy cases. The *DBSI* adversary complaints are available at: https://ecf.deb.uscourts.gov/cgi-bin/qryAscCases.pl?114658.

[24] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C01Dec10.pdf.

[25] http://ecf.nmb.uscourts.gov/cgi-bin/qryAscCases.pl?125654.

[26] http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C00Mar12.pdf.

[27] https://ecf.waeb.uscourts.gov/cgi-bin/qryAscCases.pl?158228.

consensual non-Article III adjudications, the district court judges in that district would be required to add these cases to their 2012 pending case load of 834 civil cases, leading to 27% increase in their civil dockets.[28]

Eliminating consent also will have an impact on all civil litigants. More cases on the district courts' dockets necessarily mean more delay between the filing of a complaint and trial as more cases compete for the district courts' time and attention.

Further, the elimination of consent creates "the risk of gamesmanship" by losing parties, *Roell*, 538 U.S. at 590, as the following hypothetical demonstrates: a trustee brings an action against a creditor seeking turnover of estate property. That matter is denominated as core under 28 U.S.C. § 157(b)(2)(E) and in accordance with Federal Bankruptcy Rule 7008(a), the trustee alleges that the court may enter a final judgment order; the creditor does not respond to this allegation. The bankruptcy court hears the matter without objection and enters judgment. On appeal, the creditor asserts it did not consent to be sued in the bankruptcy court and that the turnover action is outside of the bankruptcy court's constitutional core authority. If *Stern* is extended to eliminate both express and implied consent and also to eliminate the ability of bankruptcy courts to recommend proposed

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[28] http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C00Mar12.pdf.

judgments, litigants in this circumstance may safely "sit back without a word" knowing that they may "vacate any judgment that turned out not to be to their liking" and re-start their cases in the district court. *Roell*, 538 U.S. at 590.

Litigation in which the parties dispute which court will hear a matter can be inefficient and costly. Recognizing that bankruptcy cases are especially cost-sensitive, when Congress enacted the modern Bankruptcy Code, it sought to eliminate wasteful litigation about the forum in which matters would be decided. *See* Report Of The Commission On The Bankruptcy Laws Of The United States, July, 1973, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess., Part I, ch.4B. (1973). Extending *Stern* to eliminate express and implied consent would defeat this Congressional purpose and would lead to more, not less, litigation and to further delay and expense for the parties and the federal court system.

Accordingly, the ABA submits that, where, as here, considerations of judicial economy and practicality are not in conflict with constitutional principles, this Court can and should consider the impact that decision will have on the courts and both bankruptcy and non-bankruptcy litigants. *See Schor*, 478 U.S. at 850-51. The ABA therefore urges this Court to decline Petitioner's invitation to read *Stern* as eliminating the ability of litigants to consent to non-Article III adjudications.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgment of the court of appeals be affirmed.

Dated: November 15, 2013

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER H. ARKISON,
TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN COLLEGE OF BANKRUPTCY IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This Court Has Consistently Permitted Litigants To Consent To Adjudication Of Disputes By Non-Article III Judges 4

A. The English Roots Of Our Bankruptcy System 4

B. The Early American Practice Of Non-Article III Adjudications With Litigant Consent 6

C. The Bankruptcy Act Of 1898 10

II. In *Marathon* And Later Cases, This Court Has Continued To Permit Non-Article III Adjudication With Litigant Consent 16

A. The Constitutional Right To Final Judgment From An Article III Court In The Absence Of Litigant Consent 16

B. In Cases Where Litigants Consent, Structural Concerns Are Assessed By A Pragmatic Functional Analysis 18

C. Structural And Functional Considerations Point To Permitting Bankruptcy Judges To Adjudicate *Stern* Claims With Litigant Consent 22

D. The Consequences Of A Categorical Article III Bar To Bankruptcy Court Adjudication By Consenting Litigants 24

III. Litigant Consent Need Not Be Explicitly Authorized By Congress 27

IV. The Current Bankruptcy Structure Allows Bankruptcy Judges To Enter Appropriate Findings On *Stern* Claims 30

V. Petitioner's Rule Would Significantly Impair The Bankruptcy System 32

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES

Alexandria Canal Co. v Swann,
46 U.S. 83 (1847) 8

Brown v. Walker,
161 U.S. 591 (1896) 14

CFTC v. Schor,
478 U.S. 833 (1986) ..... *passim*

Cline v. Kaplan,
323 U.S. 97 (1944) 13

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 30

Granfinanciera, SA v. Nordberg,
492 U.S. 33 (1989) 17, 18, 19, 23

Harrison v. Chamberlin,
271 U.S. 191 (1926) 28

Heller v. Arnold & Porter (In re Heller),
No. 08-32514, Adv. No. 10-3203, 2011 WL 4542512 (Bankr. N.D. Cal., Sept. 28, 2011) 35

Katchen v. Landy,
382 U.S. 323 (1966) 11, 12, 18

MacDonald v. Plymouth Cnty. Trust Co.,
286 U.S. 263 (1932) ..... *passim*

Morrison v. Rocco Ferrera & Co.,
554 F.2d 290 (6th Cir. 1977)..... 14

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982)..... *passim*

Newcomb v. Wood,
97 U.S. 581 (1878)..... 8, 9, 27

Page v. Ark. Natural Gas Corp.,
286 U.S. 269 (1932)..... 11, 12, 13

Peretz v. United States,
501 U.S. 923 (1991)..... 20, 21, 22, 23

Roell v. Withrow,
538 U.S. 580 (2003)..... 22, 23, 29

Schoenthal v. Irving Trust Co.,
287 U.S. 92 (1932)..... 18

Stern v. Marshall,
131 S. Ct. 2594 (2011)..... *passim*

Taubel-Scott-Kitzmiller Co. v. Fox,
264 U.S. 426 (1924)..... 12, 28

Thomas v. Ohio State Univ.,
195 U.S. 207 (1904)..... 21

Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985)..... 20, 21

Weidhorn v. Levy,
253 U.S. 268 (1920)..... 11, 28

White v. Schloerb
178 U.S. 542 (1900) 12

York & Cumberland R.R. Co. v. Myers,
59 U.S. 246 (1855) 8

STATUTES

28 U.S.C. § 157 ..... 24, 30, 31, 32

28 U.S.C. § 158 26

28 U.S.C § 636 ..... 24, 26

Bankruptcy Act of 1898, ch. 541,
30 Stat. 544 (1898) ..... *passim*

OTHER AUTHORITIES

U.S. Const., Am. VII 17, 18

Supreme Court Rule 37 1

COLLIER ON BANKRUPTCY
(16th ed. 2010) 24

COLLIER ON BANKRUPTCY (James Wm. Moore et al. eds., 14th ed. 1978) 10

Fed. R. Civ. Proc. 13-14 & 18-24 33

Jolene Tanner, Stern v. Marshall: *The Earthquake That Hit The Bankruptcy Courts And The Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 608 (2012) 32

Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 166-67 (2012) 5, 7, 8

INTEREST OF THE *AMICUS CURIAE*

Amicus, the American College of Bankruptcy (the "College"), has never before submitted a brief to this Court.[1] The College was formed in 1989 as an honorary association of bankruptcy and insolvency professionals. Membership is by invitation only. Its eight hundred fellows include individuals associated with all facets of bankruptcy practice: commercial and consumer bankruptcy attorneys, corporate turnaround advisors, United States trustees, bankruptcy trustees, investment bankers, insolvency accountants, law professors, judges, government officials, appraisers, and others involved in all aspects of the bankruptcy and insolvency community.

The College has typically avoided intervening in legal and political controversies, and it has never before filed an *amicus* brief in any court. The College's advocacy efforts are dedicated to the overall improvement of bankruptcy jurisprudence and the fair, efficient and effective functioning of the bankruptcy process.

The College is filing its first-ever amicus brief in this case because the referral of *Stern* claims to bankruptcy judges with litigant consent is essential to the effective and efficient administration of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of *amicus* briefs and their letters of consent are on file with the Court.

bankruptcy cases and consistent with longstanding historical practice in this country. If the Court finds that Article III bars litigants from voluntarily consenting to the adjudication of *Stern* claims by bankruptcy judges, it will throw the bankruptcy system into disarray, as well as cast doubt on the constitutionality of the magistrate system and other well-established schemes for consensual referrals to non-Article III adjudicators. As a non-partisan, diverse group of experienced bankruptcy professionals with expertise across all dimensions of bankruptcy and insolvency, the College has a substantial interest in the questions presented and a unique perspective on their proper resolution.

SUMMARY OF ARGUMENT

This Court gave assurances, in *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), that the decision was not a watershed, but rather "does not change all that much." Petitioner's position, however, seriously tests that premise.

The College is convinced that Petitioner's proposed ruling, notwithstanding Petitioner's efforts to minimize its impact, would fundamentally threaten the orderly administration of our bankruptcy system. Proceedings will become mired waiting on action by district courts (already strained by increased dockets, decreased funding, and delays on judicial confirmations), while bankruptcy judges will be unable to effectively push cases forward.

Many business bankruptcy cases involve operating businesses with hundreds, if not thousands, of employees, vendors, landlords, service providers and other creditors and parties. Delay in

bankruptcy exacerbates losses and threatens the employment and livelihoods of substantial numbers of people and their families. Bankruptcy estates are necessarily limited, and the additional burden on such estates that would come to pass if Petitioner's position is upheld would be devastating.

It is no answer, as Petitioner suggests, to assign blame for this prospect to the Constitution. Article III simply does not command adoption of Petitioner's position, and indeed, a settled history of this Court's decisions refutes it.

For nearly two centuries, this Court has permitted litigants to forego their right to an Article III forum, even without any express statutory authorization to do so. In bankruptcy cases, this Court's Article III jurisprudence has honored the traditional distinction, imported from England, between summary proceedings to administer a bankruptcy estate, and plenary suits at law and in equity seeking to augment the estate. Litigants are entitled to adjudication of traditionally-plenary claims in an Article III court, but also have historically been permitted to consent to adjudication of such claims by non-Article III judges.

This case presents the perfect opportunity for the Court to clarify an area of the law that has grown increasingly tangled over the past half-century with a decisive holding that, with or without statutory authorization, litigants can consent to final adjudication of claims otherwise protected by Article III by a non-Article III bankruptcy judge.

Where Article III bars the bankruptcy judge from entering final judgment in a statutory core

proceeding (a "*Stern* claim") without litigant consent, the Court should nonetheless hold that the bankruptcy judge can submit proposed findings of fact and conclusions of law to the district court. Section 157(b)(1)'s grant of authority to bankruptcy judges, as limited by *Stern*, includes this lesser power, which is expressly acknowledged by the language and structure of the statute itself. A holding to that effect would also be consistent with this Court's tradition of minimizing the damage to a statutory scheme when only part of the scheme is unconstitutional.

ARGUMENT

I. This Court Has Consistently Permitted Litigants To Consent To Adjudication Of Disputes By Non-Article III Judges

It is impossible to understand the intertwined statutory and constitutional issues at stake in this case without examining the historical roots of today's bankruptcy system and this Court's role in the evolution of that system. This inquiry reveals a history of consistent acceptance of litigant consent to adjudication by non-Article III judges. It also reflects a healthy dose of pragmatism in accommodating the need for efficacious administration of bankruptcy estates.

A. The English Roots Of Our Bankruptcy System

Both the Framers' and this Court's understanding of bankruptcy-related adjudications grew out of the English bankruptcy system of

centuries ago, which set rigid, formalistic limits on the jurisdiction of so-called bankruptcy commissioners. Although the nomenclature of bankruptcy tribunals has changed over the years, the substantive limits on their jurisdiction have largely remained the same. From the very earliest days of bankruptcy practice in this country, the scope of non-Article III commissioners' (or referees' or bankruptcy judges') bankruptcy jurisdiction has been crafted to replicate the old British limits, with one key difference: consenting litigants have always been able to opt into a non-Article III adjudication.

Under the English system, the authority of the bankruptcy commissioners extended to whatever property the estate representative (now known as the trustee) possessed. All matters involving such property were considered "summary," including determinations of the validity of creditors' claims to a share of such property. On the other hand, any action concerning property possessed adversely by another party—for example, a suit by the trustee seeking to recover money or property for the estate—was considered "plenary," and could only be brought as a separate suit in a superior court of law or equity.

Bankruptcy commissioners decided summary matters in the first instance, but lacked authority to entertain plenary matters. The latter were reserved for a formal plenary suit in a court of law or equity. Accordingly, it is likely that the Framers viewed the Article III "judicial power" in bankruptcy cases as the power to adjudicate plenary suits against adverse claimants. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of*

Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall, 86 AM. BANKR. L.J. 121, 166-67 (2012).

B. The Early American Practice Of Non-Article III Adjudications With Litigant Consent

During the first century of the Republic, this Court repeatedly affirmed the practice of referring Article III cases and controversies to non-Article III adjudicators for entry of final judgment in accordance with the report of the referee, where litigants consented to such referrals. Litigant consent (and *not* congressional authorization thereof) was the crucial linchpin in the validity of these non-Article III adjudications.

The Court explicitly rejected challenges—conceptually very similar to Petitioner's—to the validity of such judgments in two separate cases while emphasizing the importance of litigant consent. In *Heckers v. Fowler*, involving a consensual referral of a civil suit to a referee, the plaintiff alleged that the Article III court "erred in allowing the reference" and permitting the adjudication to be "conducted by a judicial officer unknown to the courts of the United States." 69 U.S. 123, 125, 127 (1864) (objecting that "[e]ven if it is a judgment *in* the [federal] Circuit Court, it is not a judgment *of* the court"). The Court rebuffed that challenge, and upheld the propriety of the referee's report constituting a final judgment with consent of the litigants:

> [The] [p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common

> law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment.

Id. at 131 (collecting cases). *See id.* at 130 (stating that "[u]pon principle we can see no objection to the introduction of the same practice in the courts of the United States" (quoting *York & Cumberland R.R. Co. v. Myers*, 59 U.S. 246, 252 (1855)); *id.* at 128 (noting that the practice "is coeval with the organization of our judicial system").

A quarter-century later, in *Kimberly v. Arms*, the Court not only affirmed the propriety of referring a case to a non-Article III "special master," 129 U.S. 512, 524-25 (1889), but took pains to emphasize that litigant consent was required and that its absence would render the reference illegitimate:

> [It is not] competent for the court to refer the entire decision of a case to [the master] without the consent of the parties. . . . But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, . . . the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent.

Id. at 524 (emphasis added). Moreover, the Court noted that "reference of a whole case to a master ... has always been within the power of a court of

chancery, with the consent of parties," and indeed, "[t]he power is incident to all courts of superior jurisdiction." *Id.* at 524-25.

Furthermore, the Court tacitly approved the practice of referring consenting litigants to non-Article III adjudicators by upholding judgments in such cases with the legitimacy of the reference resting on litigant consent. *See, e.g., York & Cumberland R.R.*, 59 U.S. at 252, 253 (affirming referee's judgment in a breach-of-contract case and explaining that the referee can only rule on matters submitted to him by the consent of all parties); *Alexandria Canal Co. v Swann*, 46 U.S. 83, 89 (1847).

Specifically in the bankruptcy context, the Court held that litigants could, by consent, opt to have non-Article III bankruptcy referees adjudicate a plenary suit. In *Newcomb v. Wood*, 97 U.S. 581 (1878), a bankruptcy assignee (the then-equivalent of a bankruptcy trustee) sued Stephen Newcomb in district court to recover for the benefit of the bankruptcy estate certain property held adversely by Mr. Newcomb. With both parties' consent, the district court referred the case to a panel of three referees "with power to hear and determine all questions of law and fact, and report thereon to the court." *See id.* at 581. In accordance with the referees' report and over Mr. Newcomb's objections, the district court entered judgment in favor of the assignee. This Court affirmed the judgment, rejecting Mr. Newcomb's argument that the district court "erred . . . [i]n appointing referees in said cause":

> The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration . . . . In such an agreement there is nothing contrary to law or public policy.

Id. at 583.

Petitioner attempts to distinguish *Kimberly* and *Heckers* on the ground that the non-Article III masters and referees did not enter final judgment; the referring Article III court entered the judgment. Pet. Br. 31. That is misleading, though, because the referees' reports *were* binding on the Article III court, with the same effect as a final judgment—only reversible under a standard akin to appellate review. *See Heckers*, 69 U.S. at 127 (the order of reference expressly provided "that on filing the report of the said referee with the clerk of the court, judgment be entered in conformity therewith, the same as if the cause had been heard before the court"); *Kimberly*, 129 U.S. at 524 (the master's "findings, like those of an independent tribunal, are to be taken as presumptively correct," subject to revision only "when there has been a manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise"). *See also Newcomb*, 97 U.S. at 583 (defendant not entitled to *de novo* retrial in the district court because the parties' "agreement to submit the controversy to referees" indicated "clearly that they intended the [referees'] award should be final and conclusive").

C. The Bankruptcy Act Of 1898

Enacted against the backdrop of the traditional summary/plenary distinction, the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) ("1898 Act"), vested bankruptcy jurisdiction in the federal district courts and granted district judges broad authority to refer bankruptcy matters to non-Article III bankruptcy referees. The 1898 Act was less specific than predecessors in demarcating the boundaries of referee authority, so it often fell to the Court to step in to do so, guided by traditional norms of bankruptcy law and constitutional considerations.

Read literally, the 1898 Act allowed district judges to delegate practically the entirety of their bankruptcy jurisdiction to non-Article III bankruptcy referees. Section 38 of the 1898 Act granted bankruptcy referees jurisdiction to "perform such of the duties as are by this Act conferred on courts of bankruptcy." *See* COLLIER ON BANKRUPTCY appx. A, pt. 3(a), at 3-32 (16th ed. 2013) (reprinting the Bankruptcy Act of 1898, as amended through date of repeal). Moreover, section 1 defined the term "court" to include both the district court and the referee, and section 36 required referees "to take the same oath of office as that prescribed for judges of United States courts." Congress therefore authorized a referee to act as the court in a referred matter, with "all jurisdiction given the courts of bankruptcy." 2A COLLIER ON BANKRUPTCY ¶ 38.08[2], at 1415 (James Wm. Moore et al. eds., 14th ed. 1978).

But the statute was not read literally, because this Court interpreted the scope of the referees' powers to coincide with the traditional

summary/plenary distinction. For instance, in *Weidhorn v. Levy*, 253 U.S. 268, 269 (1920), after a case had already been referred generally (*i.e.*, without limitation) to the bankruptcy referee, the bankruptcy trustee filed a plenary suit before the referee against the bankrupt's brother to recover a fraudulent transfer. The referee overruled the brother's objection to the referee's jurisdiction and entered a final decree on the merits in favor of the trustee. *Id.* This Court held that a "general reference" could not authorize the referee to handle a plenary matter:

> [W]e conclude that . . . a referee, by virtue of a general reference . . . has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party . . . and affecting property not in the custody or control of the court of bankruptcy.

Id. at 274.

The Court's holding relied on the traditional summary/plenary distinction rather than the literal language of the Act. Without specific guidance from the Act itself, the Court concluded that it would be inappropriate in light of the historical tradition for a bankruptcy referee to adjudicate a plenary suit. *See id.* at 273. In summary proceedings, however, the Court treated the referee as the equal of the judge, allowing him to enter final orders reviewable only by appeal and having the same preclusive effects as a district court decision. *See id.* at 271-72; *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *Page v. Ark. Natural Gas Corp.*, 286 U.S. 269, 270-72 (1932). *See*

generally 2 COLLIER (14th ed.), *supra*, ¶ 22.05; 2A *id.* ¶¶ 38.02, 39.01[5], 39.16, 39.28-.29.

It was not just Congress, therefore, but also the Court that superintended limitations on referees' adjudicatory powers. An elaborate jurisprudence defining the scope of summary matters appropriate for final adjudication by a non-Article III referee unfolded. *See* 2A COLLIER (14th ed.), *supra*, ¶ 38.09[2]; 2 *id.* ¶¶ 23.02-23.11 (collecting extensive case law). Indeed, this Court openly acknowledged that, in administering the 1898 Act, Congress left the Court significant latitude in specifying the full scope of referees' jurisdiction. *See Katchen*, 382 U.S. at 328 ("Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and this Court has elsewhere recognized that in the absence of congressional definition this is a matter to be determined by decisions of this Court..."); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 431 & n.7 (1924) ("Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred [on the bankruptcy courts], . . . shall be exercised by summary proceedings and to what extent by plenary suit. It has not done so in terms. In the absence of congressional definition of the scope of summary proceedings, it has been determined by decisions of this Court."); 2 COLLIER (14th ed.), *supra*, ¶ 23.04[2], at 455-56 (stating that "[t]hese general principles regarding the summary jurisdiction of the bankruptcy court have been affirmed and reaffirmed in a chain of decisions beginning with *White v. Schloerb* [178 U.S. 542 (1900)] and extending down to the present date").

As part of its 1898 Act jurisprudence defining the scope of non-Article III referees' adjudicatory powers, this Court held in *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932), that a plenary suit—otherwise triable only in an Article III district court—could be adjudicated by a non-Article III referee with the parties' consent. By expressly analogizing to the ability to waive one's constitutional right to a jury trial (and expressly distinguishing non-waivable structural limitations such as subject matter jurisdiction), this Court acknowledged the waivable nature of litigants' constitutional right to final judgment from an Article III judge in plenary matters, *see id.* at 267, citing *Patton v. United States*, 281 U.S. 276 (1930), a case decided on constitutional grounds. The Court's holding, therefore, relied on the premise that the right to adjudication of plenary proceedings in an Article III district court is an individual right, waivable by the parties.

The Court later cited *MacDonald* in cases acknowledging the referee's jurisdiction to decide plenary matters among consenting litigants. *See, e.g.*, *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269, 272 (1932) (citing *MacDonald* and holding that "the referee is a court [according to the 1898 Act] and that, respondent's predecessor having consented to litigate the issues . . . and answer before the referee, the latter had jurisdiction to decide the issues"); *Cline v. Kaplan*, 323 U.S. 97, 99 (1944) (citing *MacDonald* for the proposition that the bankruptcy court lacks jurisdiction over a plenary claim "unless the claimant consents to its adjudication in the bankruptcy court").

Petitioner attempts to minimize *MacDonald* as merely "decided on statutory grounds." Pet. Br. 31 n.3 (internal quotation marks omitted). However, as was true of the entirety of this Court's 1898 Act jurisprudence demarcating the limits of referee's adjudicatory powers, *nowhere* did the statute specify comprehensively what referees could (or could not) adjudicate with (or without) litigant consent.[2] The statute expressly authorized referees to exercise the same "jurisdiction to ... perform such duties as are by this Act conferred on courts of bankruptcy," 1898 Act § 38, *without* any further distinction (provided solely by this Court) between summary and plenary proceedings. As the lower courts recognized, *MacDonald* was not merely a statutory construction decision interpreting the consent provision of 1898 Act § 23b. *See, e.g.*, *Morrison v. Rocco Ferrera & Co.*, 554 F.2d 290, 296-97 (6th Cir. 1977) (concluding that *MacDonald* permitted a referee to finally adjudicate a plenary suit with litigant consent in Chapter X bankruptcy cases in which Section 23b was entirely inapplicable). Rather, *MacDonald* was simply another in the long line of this Court's decisions crafting prudential limitations on the adjudicatory powers of non-Article III referees.

Moreover, "a mere act of Congress cannot amend the Constitution." *Brown v. Walker*, 161 U.S. 591, 619 (1896). Petitioner's attempt to distinguish *MacDonald*, therefore, also implausibly suggests that this Court turned a blind eye to the structural

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[2] The Court's discussion of Section 23b's consent provision, *MacDonald*, 286 U.S. at 265-68, spoke solely to federal subject-matter jurisdiction, which in *MacDonald* was *not* dependent upon "consent of the defendant" at all because *MacDonald* involved a suit under Section 60b. *Id.* at 265-66.

constraints of Article III when it explicitly stated that it could "perceive *no reason* why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under § 60b and § 23b, may not be waived by consent, as any other procedural privilege of the suitor may be waived." 286 U.S. at 267 (emphasis added).

In making that statement, the *MacDonald* Court cited the case of *Chicago, Burlington & Quincy Ry. Co. v. Willard*, and its extensive discussion of the principle that restrictions on federal courts' subject matter jurisdiction "cannot be waived, and the want of it will be error at any stage of the cause," including on appeal, "and cannot be overlooked by the court, even if the parties ... consent that it may be waived." 220 U.S. 413, 419-21 (1911) (quoting *Ayers v. Watson*, 113 U.S. 594, 598 (1885), and *Thomas v. Ohio State Univ.*, 195 U.S. 207, 211 (1904)). That principle, of course, is founded in the structural constitutional guarantees of Article III. *See CFTC v. Schor*, 478 U.S. 833, 850-51 (1986). By expressly dismissing the applicability of such concerns in *MacDonald*, therefore, the Court did not ignore its obligation to police litigant dilution of structural constitutional constraints, as Petitioner suggests. Rather, the Court acknowledged that such structural constitutional concerns simply were not implicated by litigant consent to a non-Article III referee's adjudication of a plenary suit.

II. In *Marathon* And Later Cases, This Court Has Continued To Permit Non-Article III Adjudication With Litigant Consent

A. The Constitutional Right To Final Judgment From An Article III Court In The Absence Of Litigant Consent

Contrary to Petitioner's attempt to brush aside this Court's extensive 1898 Act jurisprudence as mere statutory interpretation, this Court has repeatedly treated those cases as Article III precedent.

In *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982), the non-Article III bankruptcy court had entered final judgment in a suit to recover damages brought by the representative of a bankruptcy estate. The Court found this to be unconstitutional because there must be some "limiting principle" for determining the extent to which "Congress may create courts free of Article III's requirements." *Id.* at 73 (Brennan, J., plurality opinion).

The *Marathon* holding maintains the traditional historical understanding of the kinds of plenary suits requiring adjudication by an Article III court.

> [T]he Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority

> of Congress subject to the general prescriptions of Art. III.

Id. at 70.

The *Marathon* Court, though, could "discern no such exceptional grant of power applicable in the case[] before" the Court, *id.* at 71, which was precisely of the kind consistently recognized as requiring a plenary suit against an adverse claimant since well before the Founding. See *id.* at 90 (Rehnquist, J., concurring) (reasoning that "the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional [plenary] actions at common law tried by the courts at Westminster in 1789"). *See generally* Brubaker, *supra*, 86 AM. BANKR. L.J. at 122-32, 152. And such a plenary suit, absent consent of the litigants, had *never* been entrusted to final adjudication by a non-Article III judicial officer prior to the 1978 statute that *Marathon* struck down.

In *Granfinanciera, SA v. Nordberg*, 492 U.S. 33 (1989), the Court relied directly on the 1898 Act cases and the summary/plenary distinction to determine that a defendant in a fraudulent conveyance action was constitutionally entitled to an Article III court and a jury trial. The Court reasoned that "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Id.* at 54. Citing *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932), the Court explained that fraudulent conveyance "actions brought by a trustee in

bankruptcy were deemed separate, plenary suits to which the Seventh Amendment applied." *Granfinanciera*, 492 U.S. at 50. The Court also relied on *Katchen v. Landy*, which held that litigants had no Seventh Amendment rights in summary proceedings. 382 U.S. at 336-40. Acknowledging that Congress has now statutorily abolished the "distinction between plenary and summary proceedings, on which the Court relied in *Schoenthal* and *Katchen*," the Court in *Granfinanciera* invoked the constitutional implications of that long-standing historical distinction by holding that Congress could not even "purport[ ] to abolish jury trial rights in what were formerly plenary actions" "merely by relabeling the cause of action to which it attaches" and assigning jurisdiction to finally adjudicate that action to non-Article III bankruptcy judges. 492 U.S. at 60-61. *See id.* at 58 (stating that *Schoenthal* and *Katchen* did not "rest[] on an accident of statutory history").

Most recently, in *Stern*, this Court re-affirmed the constitutional significance of the summary/plenary distinction when it concluded that the nature of the damages action brought by the estate representative in that case was "the very type of claim that [the Court] held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court"—i.e., a traditionally-plenary suit "that simply attempts to augment the bankruptcy estate." 131 S. Ct. at 2616.

B. In Cases Where Litigants Consent, Structural Concerns Are Assessed By A Pragmatic Functional Analysis

Petitioner would have this Court believe that the constitutional right to final judgment from an Article III judge, recognized in *Marathon*, *Granfinanciera*, and *Stern*, is solely in service of structural protections that cannot be waived by litigants. As this Court has emphasized, however, "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect *primarily* personal, rather than structural interests," and "as a personal right, Article III's guarantee of an impartial and independent federal adjudication *is* subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49 (emphasis added).

Significantly, in *none* of the Court's bankruptcy cases holding that the traditionally-plenary action at issue must be adjudicated by an Article III court—*Marathon*, *Granfinanciera*, *Stern*—did the litigants *consent* to final adjudication by a non-Article III bankruptcy court. In the absence of consent, this Court's formal, categorical approach to the constitutional right makes sense in order to preserve inviolate the individual litigants' personal right to final adjudication of a traditionally-plenary suit by an independent Article III court.

The Court's holdings in those cases, particularly *Marathon*, went to great lengths to emphasize the

absence of litigant consent. The plurality opinion in *Marathon*, in describing the limits on the summary jurisdiction of 1898 Act referees that the 1978 statute had unconstitutionally exceeded, *twice* noted that *with consent* referees could finally adjudicate suits that otherwise (absent litigant consent) had to be tried in an Article III trial court, citing the *MacDonald* case. 458 U.S. at 53, 79-80 n.31. Justice Rehnquist's concurrence highlighted Marathon's objection to the bankruptcy court deciding the action at issue as a determinative feature in the unconstitutionality of the bankruptcy court's judgment. *Id.* at 89, 91 (Rehnquist, J., concurring). And the dissents of both Chief Justice Burger (describing the holding of the Court), *id.* at 92, and Justice White, *id.* at 95, also indicated their understanding that consent of the litigants to final adjudication in a non-Article III bankruptcy court would cure any unconstitutionality under the Court's holding, "just as" was the case "before the 1978 Act was adopted." *Id.* Likewise, the *Stern* Court emphasized that "Pierce did not truly consent to the resolution of Vickie's claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

By contrast, where the parties *have* effectively consented to a non-Article III adjudication, "consent significantly changes the constitutional analysis." *Peretz v. United States*, 501 U.S. 923, 932 (1991). *See Schor*, 478 U.S. at 849 (emphasizing that "Schor indisputably waived any right he may have possessed to full trial" of the claim at issue "before an Article III court"); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589-92 (1985) (noting

the importance of consent in the agency adjudication process at issue).

Consent removes any concern for the litigants' personal right to an Article III adjudication, and thus, only Article III's structural guarantees are at stake. To the extent the consensual adjudication at issue implicates such structural concerns (e.g., through potential inter-branch incursions), this Court has conducted a pragmatic, functional assessment that is responsive to the structural values furthered by Article III. In doing so, this Court has focused upon substance rather than form, examining whether the non-Article III adjudication at issue truly poses a threat to separation of powers and the integrity of the judicial branch.

In *Thomas*, the Court held that Article III did not bar the adjudication of claims related to a voluntary pesticide-registration program through binding non-Article III arbitration. 473 U.S. at 587. "In assessing the degree of involvement required by Article III," the Court explained that "practical attention to substance" should "inform application of Article III." *Id.* In particular, the Court listed potential considerations such as "the origin of the right at issue" and Congress's reasons for the forum selection. *Id.* It explained that applying Article III simplistically would "throw[] into doubt" many "quasi-adjudicative activities carried on by administrative agencies." *Id.* And in *Schor*, 478 U.S. at 851, in upholding a consensual agency adjudication, this Court "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the [non-Article III adjudication] will have on

the constitutionally assigned role of the federal judiciary."

Most significantly, though, in *Peretz*, 501 U.S. at 937-39, after reviewing the relevant features of the Federal Magistrates Act, this Court was "convinced that no such structural protections are implicated by the [consensual] procedure" at issue.

C. Structural And Functional Considerations Point To Permitting Bankruptcy Judges To Adjudicate *Stern* Claims With Litigant Consent

Where litigants consent to the bankruptcy court's jurisdiction over their *Stern* claim, this Court's precedent permits adjudication by the bankruptcy judge because structural concerns are not implicated and the functional consequences of forcing litigants into district court are significant. A comparison with magistrate adjudications and their compatibility with Article III underscores these points.

In the magistrate context, the Court wanted to ensure the preservation of "a litigant's right to insist on trial before an Article III . . . judge insulated from interference with his obligation to ignore everything but the merits of a case." *Roell v. Withrow*, 538 U.S. 580, 588 (2003). Where litigants had consented, though, the Court concluded that structural constitutional considerations were obviated by the fact that magistrates were fully within the control of Article III judges, who were "waiting in the wings, fully able to correct errors." *Peretz*, 501 U.S. at 938 (quoting *United States v. Raddatz*, 447 U.S. 667, 685-86 (1980)).

Similarly, the Court's structural concerns are allayed when litigants consent to final adjudication of *Stern* claims by a bankruptcy court. In fact, precisely the same relevant structural protections attendant to consensual magistrate adjudications are also present in the bankruptcy context: Article III judges have full discretionary powers of referral and withdrawal, handle all appointments and removals of bankruptcy judges, and can review any decision consistent with the appellate procedures that are available. "[T]o the extent that 'de novo review is required to satisfy Article III concerns'" for *Stern* claims, "'it need not be exercised unless requested by the parties.'" *Peretz*, 501 U.S. at 939 (quoting *United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir. 1985) (Kennedy, J.)).

"Because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger . . . 'of emasculating' constitutional courts." *Peretz*, 501 U.S. at 937 (quoting *Raddatz*, 447 U.S. at 681, and *Schor*, 478 U.S. at 850). Consequently, "no such structural protections are implicated" by bankruptcy courts' adjudication of *Stern* claims with litigant consent. *Peretz*, 501 U.S. at 937.

In *Peretz* and *Roell*, the Court also identified numerous functional advantages flowing from magistrate adjudications: the need to "relieve the district courts' 'mounting queue of civil cases' and thereby 'improve access to the courts for all groups,'" *Roell*, 538 U.S. at 588, "[to] check[] the risk of gamesmanship," *id.* at 590, to pursue "judicial efficiency," *id.*; *Peretz*, 501 U.S. at 929, 934, to maximize the compatibility of the process employed

with "the mix of congressional objectives," *Roell*, 538 U.S. at 589, to minimize the risk of secondary litigation, *id.* at 591 n.7, and to facilitate exploration of "constructive experiments that are acceptable to all participants," *Peretz*, 501 U.S. at 933, 934. Although this Court confirmed in *Marathon*, *Granfinanciera* and *Stern* that such concerns cannot justify forcing litigants to resolve traditionally-plenary suits in bankruptcy court, it has understood that such concerns are compelling in cases involving consenting litigants. As described in Part V, *infra*, the functional consequences of barring consenting litigants from the bankruptcy court would be significant. Accordingly, this Court's precedent points decidedly toward permitting bankruptcy court adjudications of *Stern* claims with litigant consent.

D. The Consequences Of A Categorical Article III Bar To Bankruptcy Court Adjudication By Consenting Litigants

If the Court finds that Article III bars consenting litigants from submitting traditionally-plenary suits to the jurisdiction of the bankruptcy court, severe repercussions will extend well beyond bankruptcy litigation. Bankruptcy Appellate Panels and Section 157(c)(2), which authorizes bankruptcy judges to finally adjudicate a non-core proceeding "with consent of all the parties," will be rendered unconstitutional. And, if Section 157(c)(2) is unconstitutional, then so too is Section 636, the consent provision of the Federal Magistrates Act. *See* 1 COLLIER ON BANKRUPTCY ¶ 3.03[4], at 3-54 (16th ed. 2013) ("The inspiration for 28 U.S.C. § 157(c)(2) is 28 U.S.C. § 636(c)(1), which deals with

the powers of United States magistrate judges in like situations.").

Finding Section 157(c)(2) unconstitutional on Article III grounds—inevitable under Petitioner's position—would be inconsistent with *Stern*, in which this Court explicitly *rejected* the notion that the constitutional right to final judgment from an Article III judge in a traditionally-plenary suit is a non-waivable structural right. Citing the litigant consent provision in Section 157(c)(2), *Stern* recognized that *nothing* in Section 157's allocation of adjudicatory authority as between the district court and the bankruptcy court is "jurisdictional" in the sense of codifying nonwaivable limitations such as subject-matter jurisdiction. 131 S. Ct. at 2607.

Through Section 157 (enacted in response to *Marathon*), Congress sought to codify Article III's constitutional limitations on bankruptcy judges' adjudicatory powers. If those limitations are nonwaivable (as Petitioner argues), that would have to be attributable to the kinds of nonwaivable structural constraints that surround subject matter jurisdiction. *See Schor*, 478 U.S. at 850-51 (stating that "[t]o the extent that this [Article III] structural principle *is* implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction" (emphasis added)). This Court in *Stern*, however, explained that Section 157, by its nature, codifies *waivable* rights. *See* 131 S. Ct. at 2607. Like the *MacDonald* Court, then, the *Stern* Court expressly acknowledged that structural constitutional concerns simply are *not* implicated by

litigant consent to adjudication of a traditionally-plenary suit by a non-Article III bankruptcy court.

A determination that bankruptcy judges cannot issue final judgments in certain matters even upon the consent of the parties would also jeopardize the constitutionality of the Bankruptcy Appellate Panels ("BAPs"), three-judge panels of bankruptcy judges that, with consent of all parties, hear bankruptcy appeals in the First, Sixth, Eighth, Ninth, and Tenth Circuits. The purpose of BAPs is to reduce delay and cost to the parties, and they exist as an alternative to appeals to the district courts. See 28 U.S.C. § 158(b)(1). Removing the jurisdiction of the BAPs would necessarily push hundreds of the BAP cases onto district court dockets in the five circuits where BAPs have been established.

Likewise, if litigant consent does not permit opting out of Article III adjudication, Section 636(c)(1)'s broad grant of authority to magistrate judges, pursuant to litigant consent, would logically be unconstitutional. *See* 28 U.S.C § 636(c)(1) (permitting magistrates to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case"). After all, the relevant structural protections surrounding Section 636 are equally present in bankruptcy: extensive oversight by an Article III judge, both in terms of appellate review and the ability to reacquire the case if necessary. Petitioner's position would even call into doubt the constitutionality of the Federal Arbitration Act. *See, e.g.*, Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189 (2008).

Petitioner would, no doubt, attempt to distinguish Sections 157(c)(2) and 636(c)(1) on the ground that they contain explicit consent provisions authorized by Congress. However, for the reasons explained in Part III below, this is an untenable distinction. Congress cannot authorize by statute that which Article III forbids. Try as it might, there is no way for Petitioner to escape the consequence that its proposed ruling would yield broader doctrinal repercussions that would significantly impair the day-to-day functioning of the federal courts.

III. Litigant Consent Need Not Be Explicitly Authorized By Congress

Petitioner's alternate argument is that Article III may permit *Stern* claims to be resolved by the bankruptcy court with litigant consent, but only with explicit statutory authorization. However, this view is inconsistent with this Court's prior decisions permitting litigant consent to a non-Article III forum without statutory authorization by Congress.

This Court has approved a number of non-Article III adjudications-by-consent with no statutory authorization whatsoever. *See Heckers*, 69 U.S. at 128 (upheld over the specific objection that "there is no act of Congress which confers any such authority" because "Federal Courts[] have authority to make and establish all necessary rules for the orderly conducting [of] business in the said courts"); *Kimberly*, 129 U.S. at 524-25 ("it has always been within the power of a court of chancery with the consent of parties, to order such a reference," which "power is incident to all courts of superior

jurisdiction"); *Newcomb*, 97 U.S. at 583 ("[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration"). Most significantly, this Court's *MacDonald* decision, discussed above, addressed precisely the issue that Petitioner's alternative argument raises and directly contradicts Petitioner's position.

MacDonald was decided against the backdrop of (1) an overly broad statutory grant to non-Article III referees of "jurisdiction to . . . perform such of the duties as are by this Act conferred on courts of bankruptcy," 1898 Act § 38, (2) this Court's decision in *Weidhorn v. Levy* that, despite that broad all-inclusive jurisdictional grant, referees could *not* adjudicate a plenary suit, and (3) no explicit grant of statutory authority for referees to adjudicate plenary suits with litigant consent. Regarding plenary suits, therefore, referees' jurisdictional grant under the 1898 Act was overly broad in precisely the same manner that this Court held Section 157(b)(2)(C) to be unconstitutionally overbroad in *Stern* and that the Ninth Circuit below held Section 157(b)(2)(H) to be unconstitutionally overbroad. While Petitioner suggests that the absence of any explicit statutory authorization for bankruptcy judges to finally adjudicate such *Stern* claims with litigant consent is a bar thereto, the *MacDonald* Court held that referees *could* finally adjudicate plenary suits with litigant consent in the face of precisely the same supposed "statutory gap" that Petitioner decries. *See MacDonald*, 286 U.S. at 264-68.

Additionally, in cases involving non-consenting parties defending against plenary actions by the bankruptcy trustee, this Court acknowledged that

litigants could consent to the bankruptcy court's jurisdiction, despite the absence of any explicit statutory authorization. *See Tabuel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U.S. 426, 433-34, 438 (1924) ("[I]n no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (*without consent*) adjudicate in a summary proceeding the validity of a substantial adverse claim[]") (emphasis added); *Harrison v. Chamberlin*, 271 U.S. 191, 193 (1926) ("[A] court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant.").

In enacting Section 157 in response to *Marathon*, Congress sought to give bankruptcy judges as much adjudicatory authority as is constitutionally permissible. While Congress misjudged the location of the constitutional line regarding *Stern* claims, that does not mean that Congress would want to deny bankruptcy judges the authority to finally adjudicate *Stern* claims with litigant consent where Article III permits it. Indeed, Congress's unrestricted grant to bankruptcy judges of final-judgment jurisdiction over *Stern* claims suggests that the opposite presumption is appropriate, as the holding of *MacDonald* also confirms.

Section 157(c)(2) reflects Congress's intent that in any proceeding in which the parties have a constitutional right to final judgment from an Article III judge, bankruptcy judges should have the authority to finally adjudicate that proceeding with the parties' consent. The entire purpose and function of the non-core category to which Section

157(c)(2) applies is to capture those proceedings in which the parties have a constitutional right to final judgment from an Article III judge. To deny this authority to bankruptcy judges for *Stern* claims simply because Congress may have misread this Court's guidance in *Marathon* would affirmatively frustrate Congress's intent. *Cf. Roell*, 538 U.S. at 586-91 (implied consent sufficed for a magistrate adjudication, despite lack of explicit statutory authorization, because of "textual clues . . . complemented by a good pragmatic reason to think that Congress intended to permit implied consent"). And the same is true of the other supposed "statutory gap" into which (Petitioner asserts) *Stern* claims purportedly fall.

IV. The Current Bankruptcy Structure Allows Bankruptcy Judges To Enter Appropriate Findings On *Stern* Claims

The text of Section 157 demonstrates that bankruptcy courts may issue proposed findings of fact and conclusions of law in *Stern* proceedings. Although *Stern* removed bankruptcy judges' power to enter final judgment in those core proceedings which "simply attempt[] to augment the bankruptcy estate," *see* 131 S. Ct. at 2616, the general statutory authorization to "hear and determine" core claims, 28 U.S.C. § 157(b)(1), includes the lesser power to issue proposed findings of fact and conclusions of law.

By removing bankruptcy judges' power to enter final judgment in certain core proceedings, *Stern* effectively invalidated a portion of the authorization in Section 157(b)(1) to finally "determine" a so-called

Stern claim, but the balance of that statutory provision remains fully applicable:

> Bankruptcy judges may *hear and determine* . . . all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments . . . .

28 U.S.C. § 157(b)(1) (emphasis added). "Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks and citation omitted).

Section 157(b)(1)'s general—and uncontested—authorization for a bankruptcy judge to "hear" a core proceeding must be read in light of Section 157(c)(1), which likewise contains a general authorization for bankruptcy judges to "hear" non-core proceedings. Section 157(c)(1) also specifies (in its second sentence) that included within the general authorization to "hear" the proceeding is the more specific direction to "submit proposed findings of fact and conclusions of law to the district court." If submission of proposed findings and conclusions is a component part of "hearing" a proceeding under Section 157(c)(1), then it is also a component part of "hearing" a *Stern* proceeding under Section 157(b)(1).

Alternatively, even if Section 157(c)(2)'s specific authorization of proposed findings and conclusions is necessary because that step is *not* subsumed within the "hearing" of a proceeding, then the second sentence is simply allocating the greater power to "determine" the proceeding as between the

bankruptcy court and the district court in a manner that reserves the ultimate "determination" by entry of a final order to the district court. In that case, when Section 157(b)(1) and (c)(1) are read in conjunction, it becomes apparent that the lesser power to "submit proposed findings of fact and conclusions of law" is subsumed within the greater power to "determine" a proceeding, which is expressly granted to bankruptcy judges in *Stern* proceedings by Section 157(b)(1). *Stern* did *not* invalidate any lesser powers contained within the power to "hear and determine" a core proceeding and "enter appropriate orders" therein.

Petitioner's all-or-nothing argument would not merely limit the jurisdiction of the bankruptcy judge, but would also encroach upon the authority granted by Section 157 to the Article III district court. To comply with *Marathon*, Congress sought to make bankruptcy courts more adjunct-like, in part, by giving district courts full discretion to refer (or not refer) any bankruptcy proceeding to the bankruptcy court and also to withdraw reference of that proceeding, "in whole or in part," at any time, even *sua sponte*. *See* 28 U.S.C. § 157(a), (d). The district court's greater power to withdraw the reference "in whole" expressly includes the lesser power to withdraw a proceeding only "in part" by, for example, requesting provisional findings and conclusions from the bankruptcy court for *de novo* review before entry of a final judgment.

Such actions happen every day – both with bankruptcy judges and magistrate judges. Any Article III concerns are satisfied by the fact that the proposed findings (like those of a special master) are just that – *proposed*. An Article III judge acting

independently must decide what judgment should be entered.

V. Petitioner's Rule Would Significantly Impair The Bankruptcy System

The practical consequences of Petitioner's position is that litigants cannot consent to final adjudication of fraudulent transfer claims, or other *Stern* claims, in bankruptcy court, and that bankruptcy judges cannot even submit proposed findings of fact and conclusions of law on such claims. The fallout would be—in the words of one bankruptcy judge—"pretty horrific." Jolene Tanner, *Stern v. Marshall: The Earthquake That Hit The Bankruptcy Courts And The Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 608 (2012) (citing interview with Judge Sheri Bluebond). Fraudulent conveyance and other avoidance claims are an integral part of almost every bankruptcy case. Placing them beyond the jurisdiction of bankruptcy courts would result in having one portion of the bankruptcy litigated in the bankruptcy court and another (often significant) portion in the district court. Some findings in both contexts, such as insolvency, overlap. A guiding purpose of modern procedure, reflected in at least nine federal rules (*see* Fed. R. Civ. Proc. 13-14 & 18-24), is to encourage (if not mandate) parties to resolve all of their disputes at one time. Petitioner's rule would yield a fragmented approach, with similar claims tried by different courts on different timetables, with no hope of consistency in adjudication.

As a result of the backlog of cases in the district courts (and particularly the priority that criminal matters constitutionally command), matters

withdrawn by district courts invariably take longer to resolve. According to the Federal Judicial Center ("FJC"), district courts averaged 12.7 months to decide civil cases before trial and 23.4 months to decide cases that go to trial. 2012 Annual Report, Administrative Office of the United States Courts, at www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx ("Judicial Business"). Given that companies in Chapter 11 bankruptcy are often a "melting ice cube," the pace of a civil case in the district courts is far too slow.

At the end of 2012, there were over 70,000 adversary proceedings pending in bankruptcy courts across the country—many of which are likely to be fraudulent transfer or other potential *Stern* claims that would have to be shifted to the district courts under Petitioner's rule. Judicial Business, Table F-8. There are approximately 334 bankruptcy judges and 611 district court judges. If those 334 bankruptcy judges each lost a significant portion of their workload, it would quickly overwhelm the district judges. Indeed, for every civil case filed in 2012, there were almost *five* new bankruptcy cases. Judicial Business, Caseload Highlights. The impact of these new cases on the district courts will be particularly hard as they are now feeling the effects of sequestration and other budgetary constraints, with their concomitant cuts of court budgets and staff.

Unfortunately, the district courts that are already in a judicial emergency will be the hardest hit by such a decision. For example, the Eastern District of California is already swamped, with 1,132 cases per judgeship, nearly twice the 600 cases that the FJC considers to create a judicial

emergency. The bankruptcy court in that district is also one of the Nation's busiest, with over a thousand businesses filing for bankruptcy in 2012. Judicial Business, Report F-5A. Commercial filings are complex and likely to result in fraudulent conveyance and other *Stern* claims—which would have to be decided by the district court under Petitioner's broad reading of *Stern*. For example, the bankruptcy of the Lyondell Chemical Company (No. 09-01037, Bankr. S.D.N.Y) spawned more than 600 adversary actions, many of which would have to be resolved in the district court under Petitioner's reading of *Stern*. The District of Delaware has even more cases per judgeship (1,165), and faces about a thousand commercial bankruptcy cases each year. Judicial Business, Report F-5A. The Central District of California is likewise in a judicial emergency, and had more than 3,500 commercial bankruptcies filed in 2012. *Id.* Those district court judges would have to shoulder many of those additional cases. Other districts, such as the Southern District of New York and the Northern District of Georgia, would be pushed into judicial emergencies by the new caseload attendant to an expansion of *Stern*.

In addition to the complex commercial cases, tens of thousands of (the million-plus) cases filed by individuals each year involve significant assets. Many of those cases also involve fraudulent transfer actions that would necessarily require the attention of district courts.

The elimination of the BAPs as unconstitutional, which would be required under Petitioner's

argument, would further exacerbate the strain on the district courts.

In the end, where the parties are willing to have their disputes heard by bankruptcy judges, an "unnecessary extension" of *Stern* "would be an inefficient use of judicial resources by overburdening the district court and foregoing the services of a bankruptcy court ready, willing and able to do its job." *Heller v. Arnold & Porter (In re Heller)*, No. 08-32514, Adv. No. 10-3203, 2011 WL 4542512, *1 (Bankr. N.D. Cal., Sept. 28, 2011). Petitioner's proposal would prevent parties from consenting to have their *Stern* disputes settled by bankruptcy judges, creating unnecessary delay and cost for the entire system.

CONCLUSION

For these reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PROFESSORS S. TODD BROWN, G. MARCUS COLE, AND RONALD D. ROTUNDA AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. BANKRUPTCY COURTS MAY ENTER PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN FRAUDULENT CONVEYANCE ACTIONS 5

A. The Language, History, And Purpose Of Section 157 Reflect Congress's Intent To Extend Bankruptcy Courts' Authority To The Constitutional Limit 5

B. The 1984 Act Erroneously Included, As Examples Of "Core Matters," Certain Claims That Are Matters Of Private Right 11

C. There Is No Irremediable "Statutory Gap" 13

II. BANKRUPTCY COURTS MAY "HEAR AND DETERMINE" FRAUDULENT CONVEYANCE SUITS WITH THE CONSENT OF THE PARTIES, BUT SUCH CONSENT MUST BE EXPRESS 20

A. Litigants May Consent To A Bankruptcy Court's Entry Of Final Judgment In A Non-Core Matter 21

B. A Litigant's Consent Must Be Express 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page(s)

Alaska Airlines v. *Brock*, 480 U.S. 678 (1987) 15

Ayotte v. *Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) 14

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 27

Burtch v. *Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626 (Bankr. D. Del. 2012) 13

Celotex Corp. v. *Edwards*, 514 U.S. 300 (1995) 6, 16

Central Virginia Community College v. *Katz*, 546 U.S. 356 (2006) 5

Champlin Refining Co. v. *Corporation Commission of Oklahoma*, 286 U.S. 210 (1932) 14

Cifelli v. *Blue Star Residential (In re Miles)*, 477 B.R. 266 (Bankr. N.D. Ga. 2012) 13

Commodity Futures Trading Commission v. *Schor*, 478 U.S. 833 (1986) 4, 5, 21, 23, 25

Feuerbacher v. *Moser*, 2012 WL 1070138 (E.D. Tex. Mar. 29, 2012) 13

Free Enterprise Fund v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010) 14

Gomez v. *United States*, 490 U.S. 858 (1989) 22, 26

Granfinanciera S.A. v. *Nordberg*, 492 U.S. 33 (1989) 3, 6, 11, 12, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Heckers v. *Fowler*, 69 U.S. (2 Wall.) 123 (1864) 23

In re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987) 10

In re CBI Holding Co., 529 F.3d 432 (2d Cir. 2008) 10

In re Lyondell Chemical Co., 467 B.R. 712 (S.D.N.Y. 2012) 27

In re Madison Bentley Associates, LLC, 474 B.R. 430 (S.D.N.Y. 2012) 27

In re Mankin, 823 F.2d 1296 (9th Cir. 1987) 10

Katchen v. *Landy*, 382 U.S. 323 (1966) 6, 12

Kimberly v. *Arms*, 129 U.S. 512 (1889) 23

Kirschner v. *Agoglia (In re Refco Inc.)*, 461 B.R. 181 (Bankr. S.D.N.Y. 2011) 13

Kontrick v. *Ryan*, 540 U.S. 443 (2004) 27

Langenkamp v. *Culp*, 498 U.S. 42 (1990) 12

MacDonald v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932) 6

National Federation of Independent Business v. *Sebelius*, 132 S. Ct. 2566 (2012) 14

Newcomb v. *Wood*, 97 U.S. (7 Otto) 581 (1878) 23

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Pacemaker Diagnostic Clinic of America, Inc. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) 24

Pacor, Inc. v. *Higgins*, 743 F.2d 984 (3d Cir. 1984) 16

Peretz v. *United States*, 501 U.S. 923 (1991) 21, 22, 23

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 15

Roell v. *Withrow*, 538 U.S. 580 (2003) 2, 27, 28

Schoenthal v. *Irving Trust Co.*, 287 U.S. 92 (1932) 6

Silverman v. *A-Z RX LLC (In re Allou Distributors Inc.)*, 2012 WL 6012149 (Bankr. E.D.N.Y. Dec. 3, 2012) 13

Stern v. *Marshall*, 131 S. Ct. 2594 (2011) ..... *passim*

Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) 8, 22

Tilton v. *Richardson*, 403 U.S. 672 (1971) 15

United States v. *Booker*, 543 U.S. 220 (2005) 14

United States v. *Olano*, 507 U.S. 725 (1993) 29

Wellness International Network, Ltd. v. *Sharif*, 727 F.3d 751 (7th Cir. 2013) 19

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const.
art. III ..... *passim*
art. III, § 1 ..... 4, 21

11 U.S.C. § 502(d) 12

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C.
§ 151 ..... 8, 14, 23
§ 152(a) 23
§ 152(a)(1) 8
§ 152(e) 8, 23
§ 157 ..... 14, 17
§ 157(a) 8, 24
§ 157(b)(1) 10
§ 157(b)(2) 3, 11, 18
§ 157(b)(2)(B) 11
§ 157(b)(2)(C) 11, 22
§ 157(b)(2)(H) ..... *passim*
§ 157(b)(2)(I) 11
§ 157(b)(2)(K) 11
§ 157(c)(1) 4, 10, 15, 16, 18
§ 157(c)(2) 10, 20, 21, 25, 26
§ 157(d) 9, 18, 24
§ 158 24
§ 636(c)(1) 24, 27
§ 1334 8
§ 1471(b) (1976 ed., Supp. IV) 5, 8

Pub. L. No. 55-171, 30 Stat. 544 (1898) (repealed 1979) 6

Pub. L. No. 95-598, 92 Stat. 2549 (1978) (repealed 1984) 6, 7

Pub. L. No. 98-353, 98 Stat. 333 (1984) 8, 14

TABLE OF AUTHORITIES—Continued

Page(s)

RULES

Fed. R. Bankr. P.
Rule 7008 27
Rule 7008(a) 26
Rule 7012 ..... 25, 26
Rule 7012(b) 5, 20, 26, 27, 28

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-595 (1977) 6

130 Cong. Rec. E1109 (daily ed. Mar. 20, 1984) 9

OTHER AUTHORITIES

American Bar Association Resolution 109 (Feb. 11, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_109.authcheckdam.docx 24

Brubaker, Ralph, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern *v.* Marshall, 86 Am. Bankr. L.J. 121 (2012) 9

Brubaker, Ralph, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743 (2000) 7

INTEREST OF AMICI CURIAE[1]

Amici are law professors whose expertise ranges from bankruptcy law to federal jurisdiction to constitutional law. S. Todd Brown is an Associate Professor and the Director of the Center for the Study of Business Transactions at the State University of New York at Buffalo School of Law. G. Marcus Cole is the Wm. Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School. Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, The Dale E. Fowler School of Law at Chapman University.

Amici share a scholarly interest regarding the nature and scope of bankruptcy courts' statutory and constitutional authority. Amici filed a brief in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and in this case when it was before the Ninth Circuit, *see* Brief For Amici S. Todd Brown et al., No. 11-35162, *Executive Benefits Insurance Agency* v. *Arkison (In re Bellingham Insurance Agency, Inc.)* (Jan. 13, 2012).

SUMMARY OF ARGUMENT

Amici submit that the judgment below should be affirmed, but reach that result by a different path than respondent.

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

Amici agree that this Court should reject petitioner's wooden approach to both the statutory and constitutional questions presented here—one that would eviscerate the functioning not only of the bankruptcy courts, but also of the federal magistrate system. Amici believe, however, that the statutory question presented is best understood against the backdrop of Congress's effort to respond to the constitutional concerns embodied in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). That is, Congress intended "core" and "non-core" proceedings to be, respectively, proceedings as to which the bankruptcy court may constitutionally enter final judgment and proceedings as to which (absent consent) it may not. Once that is understood, principles of severability readily provide the answer to the statutory question: Bankruptcy courts may enter proposed findings of fact and conclusions of law in fraudulent conveyance actions.

As for the constitutional question—whether parties may consent to entry of final judgment by the bankruptcy court in non-core proceedings—amici agree with respondent that parties may consent. But consent may not be implied: The Federal Rules of Bankruptcy Procedure specifically state that consent must be "express," and *Roell* v. *Withrow*, 538 U.S. 580 (2003), provides no justification for reading that requirement out of the rule. The judgment below should nonetheless be affirmed because petitioner actually received de novo review of its claim by the district court, and Article III entitles it to nothing further.

1. There is no dispute that 28 U.S.C. § 157(b)(2)(H), which purports to grant bankruptcy courts the authority to enter final judgment in fraudulent conveyance actions, is unconstitutional under

Granfinanciera S.A. v. *Nordberg*, 492 U.S. 33 (1989), and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). That subparagraph must, then, be stricken from the statute. The question whether bankruptcy courts may enter proposed findings of fact and conclusions of law in fraudulent conveyance actions requires construing the remainder of Section 157 in light of basic principles of severability—that is, asking how Congress would have intended the statute to operate had it known that bankruptcy courts could not constitutionally enter final judgment, absent consent, in such actions.

When the question is framed that way, it can have only one answer. Congress created the "core" and "non-core" categories in response to this Court's decision in *Marathon*. It intended "core" proceedings to be proceedings that may, consistent with Article III, be heard and determined by a bankruptcy court—put differently, matters of public right. And it intended "non-core" proceedings to be proceedings as to which a litigant is entitled to an Article III tribunal—or matters of private right.

So far, Congress's plan was consistent with Article III. As *Stern* held, however, Congress erred in some respects when it drew the line between core and non-core proceedings. Accordingly, some of the examples of core proceedings set out in Section 157(b)(2)—including certain counterclaims by the estate against non-creditors (subparagraph (C)) and fraudulent conveyance actions against non-creditors (subparagraph (H))—are not, in fact, proceedings as to which the bankruptcy court may constitutionally enter final judgment absent consent.

That flaw in the statute, however, can be remedied simply by striking those subparagraphs—or, more pre-

cisely, their unconstitutional applications. Contrary to petitioner, that does not open an irremediable statutory "gap" preventing bankruptcy courts from taking any action at all in such proceedings. Once Section 157(b)(2)(H) is stricken, fraudulent conveyance claims against non-creditors become "non-core" proceedings, and Section 157(c)(1) expressly grants bankruptcy courts the authority to enter proposed findings of fact and conclusions of law. That is the conclusion demanded by the language and structure of the statute, and it is also the only conclusion consistent with Congress's plain intention to give bankruptcy courts as much authority as they may constitutionally wield.

2. Because bankruptcy courts may enter findings and conclusions for de novo review by the district court in fraudulent conveyance actions, and because petitioner received the de novo review by the district court to which it was entitled, this Court need go no further: The court of appeals' judgment should be affirmed whether or not petitioner validly consented to entry of final judgment by the bankruptcy court.

Should the Court reach the constitutional question, however, it should hold that Article III poses no barrier to a bankruptcy court's entering final judgment in a fraudulent conveyance action with the parties' consent. This Court explained in *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), that Article III, § 1, serves to protect "primarily personal, rather than structural, interests," and that such personal rights are waivable. *Id.* at 848. To be sure, Article III, § 1, also protects against encroachment by the political branches on the judicial branch—and arguably against improper delegation by the judicial branch of its own duties—and "the parties cannot by consent cure" such structural flaws. *Id.* at 851. But no such encroachment

or improper delegation is present here, given that bankruptcy courts are units of the district court and can adjudicate matters only by reference from the district court that may at any time be withdrawn. Accordingly, the parties may give their consent to entry of final judgment by the bankruptcy court—just as they may to entry of final judgment by a federal magistrate.

Such consent may not, however, be implied. Federal Rule of Bankruptcy Procedure 7012(b) plainly states that "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express* consent of the parties." Fed. R. Bankr. P. 7012(b) (emphasis added). *Roell* v. *Withrow*, which interpreted a different statutory scheme and addressed very different facts, provides no basis to rewrite the clear requirement of the rule.

ARGUMENT

I. BANKRUPTCY COURTS MAY ENTER PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN FRAUDULENT CONVEYANCE ACTIONS

A. The Language, History, And Purpose Of Section 157 Reflect Congress's Intent To Extend Bankruptcy Courts' Authority To The Constitutional Limit

Consistent with historical practice, the Bankruptcy Act of 1898 divided bankruptcy proceedings into "summary" proceedings involving "the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge [of the debt]," *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006), over which bankruptcy referees exercised broad authority, and "plenary" proceedings involving other legal controversies related to the bank-

ruptcy, over which referees exercised more limited authority. *See* Pub. L. No. 55-171, 30 Stat. 544, 552 (1898) (repealed 1979); *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-268 (1932). "'[S]uits to recover preferences,'" for example, were deemed "'separate, plenary suits'" that bankruptcy referees could not decide unless the parties consented. *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 49-50 (1989) (quoting *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 95 (1932)); *see also Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 79 n.31 (1982) (referees had "no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court"). The parameters of summary jurisdiction, however, were never precisely defined, inviting strategic litigation over referees' ability to adjudicate certain claims. *See Katchen* v. *Landy*, 382 U.S. 323, 328 (1966).

In 1978, in part to alleviate this problem, Congress "substantially expanded" bankruptcy courts' authority. H.R. Rep. No. 95-595, at 13 (1977). The new Bankruptcy Code abolished the statutory distinction between summary and plenary proceedings and permitted newly constituted "bankruptcy courts" to hear and determine "*all* civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [it]." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (enacting 28 U.S.C. § 1471(b)) (repealed 1984) (emphasis added); *see also* H.R. Rep. No. 95-595, at 13 ("[p]ossession or consent will no longer be necessary to the jurisdiction of the bankruptcy courts"); *Marathon*, 458 U.S. at 54. This "distinct departure from the jurisdiction conferred under previous Acts," *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995), "sought to simplify jurisdictional

inquiries with a statutory grant of an awesome magnitude," Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 791 (2000). But although the 1978 Code permitted bankruptcy courts to enter final judgment in any proceeding within federal bankruptcy jurisdiction, bankruptcy judges were not given the Article III protections of lifetime tenure and undiminished compensation.[2]

In *Marathon*, this Court held that broad grant of power to a non-Article III court unconstitutional. *See* 458 U.S. at 87 (plurality); *id.* at 91 (Rehnquist, J., concurring in the judgment). *Marathon* involved a state-law breach-of-contract action brought by a debtor against a third-party non-creditor. The Court concluded that such an action was a matter of "private right," as opposed to "public right," and thus could not constitutionally be decided by a non-Article III tribunal absent the parties' consent. The plurality explained that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," and thus arguably a matter of public right that Congress could remit to a non-Article III tribunal for decision, "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." *Id.* at 71. While the "divided Court" was unable to agree on the precise scope of the public-rights

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[2] The 1978 Code provided that the President would appoint bankruptcy judges to fourteen-year terms, with the judges subject to removal for cause by the judicial council for the circuit in which the judge was serving. *See* Pub. L. No. 95-598, § 201(a), 92 Stat. at 2657-2658 (enacting 28 U.S.C. §§ 152-153) (repealed 1984). It set bankruptcy judges' salaries at a fixed sum subject to adjustment under the Federal Salary Act. *See id.* § 201(a), 92 Stat. at 2658 (enacting 28 U.S.C. § 154).

doctrine, a majority of the Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (citing *Marathon*, 458 U.S. at 84).

In response to *Marathon*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). While rejecting proposals to establish an Article III bankruptcy court, Congress sought to satisfy this Court's instruction that "'the essential attributes' of judicial power" be retained in the Article III court. *Marathon*, 458 U.S. at 87. Accordingly, while the 1984 Act did not alter the scope of bankruptcy jurisdiction set out in the 1978 Code, *compare* 28 U.S.C. § 1471(b) (1976 ed., Supp. IV), *with id.* § 1334, it replaced the independent bankruptcy court established in the 1978 Code with an entity that would be a "unit" of the district courts and would hear bankruptcy proceedings only by referral from the district courts, *see id.* § 151.[3] Specifically, district courts "may provide that any or all cases under [the Bankruptcy Code] and any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Code] shall be referred to the bankruptcy judges for the district." *Id.* § 157(a). Moreover, "[t]he district court may withdraw, in whole or in part, any case or proceeding referred [to the bankrupt-

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[3] Under the 1984 Act, bankruptcy judges are appointed by the courts of appeals for fourteen-year terms, 28 U.S.C. § 152(a)(1), and may be removed for cause by the judicial council for the circuit in which the bankruptcy court is located, *id.* § 152(e).

cy court], on its own motion or on timely motion of any party, for cause shown." *Id.* § 157(d).[4]

In addition, the 1984 Act drew a distinction—at the heart of the statute's scheme for constitutionally allocating authority between district and bankruptcy courts—between "core" and "non-core" bankruptcy proceedings. The "core" designation sprang from *Marathon*'s statement that "the restructuring of debtor-creditor relations ... is at the core of the federal bankruptcy power," 458 U.S. at 71 (plurality), and the core/non-core distinction was intended to track *Marathon*'s dichotomy between public and private rights.[5]

As one of the 1984 Act's sponsors explained, core proceedings were intended to be those "integral to the core bankruptcy function of restructuring debtor-creditor rights," 130 Cong. Rec. E1109 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier)—that is, matters of public right as to which the bankruptcy courts could constitutionally enter final judgment. The Act accordingly authorizes bankruptcy courts to "hear and determine ... all core proceedings arising under [the Bankruptcy Code] or arising in a case under [the Bank-

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[4] Withdrawal of a proceeding from the bankruptcy court is mandatory "if the [district] court determines that resolution of the proceeding requires consideration of both [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d).

[5] *See* Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern *v.* Marshall, 86 Am. Bankr. L.J. 121, 136 (2012) ("The terminology of 'core' bankruptcy proceedings has no statutory ancestors and is apparently taken from Justice Brennan's plurality opinion, wherein he said that 'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights.'").

ruptcy Code]" and to "enter appropriate orders and judgments" in such proceedings, subject only to ordinary appellate review. 28 U.S.C. § 157(b)(1). By contrast, "[n]on-core proceedings ... concern aspects of the bankruptcy case that *Marathon* barred non-Article III judges from determining on their own." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987) (Breyer, J.). Under the Act, non-core proceedings include any "proceeding that is not a core proceeding but that is otherwise related to a case under title 11," 28 U.S.C. § 157(c)(1)—that is, any proceeding within the outer bounds of bankruptcy jurisdiction that is not core. Absent the parties' consent, *see id.* § 157(c)(2), in non-core proceedings bankruptcy courts may only enter proposed findings of fact and conclusions of law, subject to de novo review by the district court, *id.* § 157(c)(1).

Congress thus chose to define core proceedings "broadly, close to or congruent with constitutional limits." *Arnold Print Works*, 815 F.2d at 168; *see also In re CBI Holding Co.*, 529 F.3d 432, 460 (2d Cir. 2008) ("In crafting § 157, 'Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings and intended that the "core" jurisdiction would be construed as broadly as possible subject to the constitutional limits established in *Marathon*.'"); *In re Mankin*, 823 F.2d 1296, 1301 (9th Cir. 1987) ("Nothing in the legislative history of § 157(b) suggests that Congress enumerated examples of core proceedings in § 157(b)(2) with anything but a view toward expanding the bankruptcy court's jurisdiction to its constitutional limit."). In doing so, Congress intended both that the category of core proceedings that the bankruptcy court may hear and determine be as broad as possible consistent with the Constitution, and that the bankruptcy court have

the power to issue findings and conclusions in all other proceedings within bankruptcy jurisdiction.

B. The 1984 Act Erroneously Included, As Examples Of "Core Matters," Certain Claims That Are Matters Of Private Right

In the 1984 Act, Congress enumerated certain examples of core proceedings—proceedings that it believed the bankruptcy courts could constitutionally hear and determine without the parties' consent. 28 U.S.C. § 157(b)(2). Core proceedings include, for instance, the "allowance or disallowance of claims against the estate," *id.* § 157(b)(2)(B), "determinations as to the dischargeability of particular debts," *id.* § 157(b)(2)(I), and "determinations of the validity, extent, or priority of liens," *id.* § 157(b)(2)(K).

This Court held in *Stern*, however, that Congress erred in at least one instance in enumerating those examples. Congress included in its list of core proceedings "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(C). As applied to the counterclaim at issue in *Stern*—a state-law tort claim by the debtor against a creditor that did not need to be decided to adjudicate the creditor's claim—this Court held that § 157(b)(2)(C) unconstitutionally granted the bankruptcy court the authority to enter final judgment in a matter of private right without the litigants' consent. *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011).

Stern, in combination with *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), makes clear that Section 157(b)(2)(H)—which provides that "proceedings to determine, avoid or recover fraudulent conveyances" are core proceedings—is likewise unconstitutional when

applied to a suit against a non-creditor.[6] *Granfinanciera* held that the Seventh Amendment entitles a non-creditor in a fraudulent conveyance action to a jury trial. 492 U.S. at 58-59. Moreover, it explained that "the Seventh Amendment [question] ... requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. Lower courts were slow to recognize that, under the reasoning of *Granfinanciera*, non-creditor defendants in fraudulent conveyance actions were accordingly entitled to an Article III court. But *Stern* made that conclusion inescapable, noting that the fraudulent conveyance claim in *Granfinanciera*, like the debtor's counterclaim in *Stern*, "does not fall within any of the varied formulations of the public rights exceptions in this Court's cases." 131 S. Ct. at 2614.

As the court of appeals correctly held, Pet. App. 15a—and as respondent does not here contest—*Stern* and *Granfinanciera* compel the conclusion that fraudulent conveyance actions against non-creditors are mat-

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[6] The analysis is different when a fraudulent conveyance suit is brought against a creditor who has filed a proof of claim in the bankruptcy case. Section 502(d) of the Bankruptcy Code provides that the bankruptcy court "shall disallow" a claim by any creditor who is a transferee of a fraudulent transfer that has not been repaid. 11 U.S.C. § 502(d). Accordingly, a fraudulent conveyance suit against a creditor must be decided before the creditor's claim can be adjudicated. It is thus part of the process of allowance and disallowance of claims, as to which the bankruptcy court may constitutionally enter final judgment. *See Stern*, 131 S. Ct. at 2616-2617; *Katchen*, 382 U.S. at 336; *Langenkamp* v. *Culp*, 498 U.S. 42, 44-45 (1990) (per curiam).

ters of private right. Section 157(b)(2)(H) thus contravenes Article III.[7]

C. There Is No Irremediable "Statutory Gap"

Petitioner contends (at 46-57) that, given this constitutional flaw, bankruptcy courts are powerless to take any action whatever in a fraudulent conveyance proceeding, and that, until Congress amends the statute, all fraudulent conveyance suits must be heard from beginning to end in district court. But that result is as unnecessary as it is impractical. Properly understood, the statute clearly provides that the bankruptcy courts may enter proposed findings of fact and conclusions of law in such suits.

1. Where, as here, a particular provision of a statute is found to be unconstitutional, the question how to interpret the remainder of the statutory scheme is informed by basic principles of severability. A court must first decide whether Congress would have wanted

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[7] Indeed, in the court of appeals the United States conceded that Section 157(b)(2)(H) exceeded Congress's constitutional authority. U.S. Amicus Br. 2-3, 13-14, No. 11-35162, *Executive Benefits Insurance Agency* v. *Arkison (In re Bellingham Insurance Agency, Inc.)* (9th Cir. Jan. 19, 2012). Some lower courts have nevertheless reached a contrary conclusion, holding that a bankruptcy court may enter final judgment on a fraudulent conveyance claim against a non-creditor, even without consent of the parties. *See, e.g.*, *Burtch* v. *Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626, 646 (Bankr. D. Del. 2012); *Cifelli* v. *Blue Star Residential (In re Miles)*, 477 B.R. 266, 270-271 (Bankr. N.D. Ga. 2012); *Feuerbacher* v. *Moser*, 2012 WL 1070138, at *6-9 (E.D. Tex. Mar. 29, 2012); *Silverman* v. *A-Z RX LLC (In re Allou Distribs. Inc.)*, 2012 WL 6012149, at *8-9 (Bankr. E.D.N.Y. Dec. 3, 2012); *Kirschner* v. *Agoglia (In re Refco Inc.)*, 461 B.R. 181, 191-192 (Bankr. S.D.N.Y. 2011). This Court should thus say clearly that, absent consent, the authority to issue a final judgment in such a proceeding is reserved to Article III courts.

the rest of the Act to stand had it known that the offending provision was unconstitutional. *See, e.g.*, *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2607 (2012). "Unless it is 'evident' that the answer is no," the Court "must leave the rest of the Act intact." *Id.* (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932)); *see also Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (the relevant question is whether "the legislature would have preferred what is left of its statute to no statute at all"); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-3162 (2010).

Here, that threshold question is answered by Congress's inclusion of a severability clause in the 1984 Act: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby." Pub. L. No. 98-353, 98 Stat. 333, 344 (1984), *codified at* note following 28 U.S.C. § 151. A severability clause is "Congress' explicit textual instruction to leave unaffected 'the remainder of [the Act]'" if any particular provision or application of it is unconstitutional. *Sebelius*, 132 S. Ct. at 2607 (examining a substantially identical severability clause); *see also id.* ("a severability clause confirm[s] that we need go no further").

Moreover, without Section 157(b)(2)(H), Section 157 remains "consistent with Congress' basic objectives in enacting the statute," *United States* v. *Booker*, 543 U.S. 220, 259 (2005), and would continue to further "Congress' basic statutory goal," *id.* at 250. Indeed, it is "sure that the policies Congress sought to advance by enacting [Section 157] can be effectuated even though

[part of it] is unenforceable." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984). That much is obvious, given that Section 157(b)(2)(H) is merely one example of a core proceeding, and that Congress's basic allocation of power between the district and bankruptcy courts will remain unchanged. Subparagraph (H) is not "essential to the statutory program as a whole," *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971), nor is "the balance of the legislation ... incapable of functioning independently," *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987).[8]

2. The question then arises how to interpret the remainder of the statute, once the unconstitutional provision has been severed. That question is readily answered by recourse to the plain text and undisputed purpose of the statute. Once Section 157(b)(2)(H)—or its unconstitutional application to suits against non-creditors—is stricken, nothing in the statute requires the conclusion that fraudulent conveyance suits against non-creditors are core proceedings. To the contrary, because Congress plainly intended the category of core proceedings to track the category of matters of public right identified in *Marathon*, once Section 157(b)(2)(H) is severed, the only reasonable conclusion is that fraudulent conveyance actions against non-creditors—which are matters of private right—are non-core matters. And Section 157(c)(1) provides that "[a] bankruptcy judge may hear a proceeding that is not a core proceed-

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[8] The presence of a severability clause in the 1984 Act—together with the discrete nature of the unconstitutional subparagraph—makes this case entirely different from *Marathon*, where the Court concluded that the unconstitutional grant of authority to bankruptcy courts to adjudicate matters of private right was "not readily severable from the remaining grant of authority to bankruptcy courts under § 1471." 458 U.S. at 91-92 (Rehnquist, J., concurring); *see id.* at 88 n.40 (plurality).

ing but is otherwise related to a case under title 11," directing the bankruptcy judge in such proceedings to "submit proposed findings of fact and conclusions of law to the district court" subject to de novo review. 28 U.S.C. § 157(c)(1). Because fraudulent conveyance suits are unquestionably "related to" the bankruptcy case—that is, if successful, they will augment the bankruptcy estate, *see Celotex*, 514 U.S. at 308 n.6; *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)—Section 157(c)(1) grants bankruptcy courts the power to hear them and to enter findings and conclusions for district court review.[9]

That fraudulent conveyance actions can be said to "arise under" the Bankruptcy Code makes no difference to this analysis. It is undoubtedly true that Congress viewed "core" proceedings as generally synonymous with "arising in" and "arising under" proceedings. As *Stern* noted, "[u]nder our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11." 131 S. Ct. at 2605. The obverse will also usually be true: Proceedings that arise in a bankruptcy case or under Title 11 will generally be core, even if not enumerated in the non-exclusive list of examples of core matters. But nothing in the statute mandates that *all* proceedings that arise in a bankruptcy case or under Title 11 must be core, and fraudulent conveyance actions are an exception. They "arise under" the Bankruptcy Code because the federal cause of action is set forth in Sections 544 and 548 of the Code.

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[9] A proceeding that arises under the Code may still be "related to" a bankruptcy case, because the "related to" concept merely sets the outer limits of bankruptcy jurisdiction, which extends to any dispute that "could conceivably have any effect on the estate being administered in bankruptcy," *Pacor*, 743 F.2d at 994 (emphasis omitted).

As *Granfinanciera* explains, however, the Bankruptcy Code merely codified a preexisting common-law cause of action that was, and remains, a matter of private right. 492 U.S. at 60-61. Accordingly, fraudulent conveyances cannot be "core" as a constitutional matter. And because—after severance of the unconstitutional subparagraph—the remainder of Section 157 should be construed in accordance with Congress's intention to mirror the constitutional categories set out in *Marathon*, fraudulent conveyances should not be deemed "core" as a statutory matter either.

That conclusion gives effect to Congress's purpose—to confer on the bankruptcy court all the authority it could constitutionally exercise. As noted above, *see supra* pp. 8-11, Congress intended that bankruptcy courts have the power to enter final judgment in bankruptcy proceedings to the full extent consistent with the Constitution, and that they have the power to "hear" and issue findings and conclusions in all other bankruptcy proceedings. Where, as here, Congress erroneously characterizes a non-core proceeding as core, the statute is best read to permit bankruptcy courts to exercise the same authority they would exercise over any other non-core proceeding.

Stern is not to the contrary. Indeed, permitting bankruptcy courts to enter findings and conclusions in fraudulent conveyance suits (and on counterclaims like the one in *Stern*) is the only result that makes sense of *Stern*'s statement that its holding "is a 'narrow' one." 131 S. Ct. at 2620. This Court noted that no one in *Stern* argued that bankruptcy courts "'are barred from "hearing" all counterclaims' or proposing findings of fact and conclusions of law on those matters," *id.*, and while it did not address that question directly, it certainly nowhere intimated that its reasoning supported

such a conclusion. To the contrary, the Court commented that "[w]e do not think the removal of counterclaims such as [petitioner's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute." *Id.* If *Stern* meant that district courts would have to hear, as well as determine, all such claims, the division of labor would be changed materially and the district court would assume substantial additional burdens. Nothing in *Stern* warrants that result.

3. Petitioner reaches the wrong answer because it asks the wrong question. Petitioner frames the issue as whether the statute authorizes bankruptcy courts to issue findings and conclusions in a *core* matter. Pet. Br. 46. The answer to that question is probably yes. The statute does not *require* the bankruptcy court to enter final judgment in core matters. Indeed, it expressly permits the district courts to withdraw the reference of core matters at any time. *See* 28 U.S.C. § 157(d). As the court of appeals held (Pet. App. 24a-26a) and respondent explains (Resp. Br. 63-69), it is thus more than plausible to read Section 157(b)(1)'s provision that bankruptcy courts "may hear and determine" core proceedings to carry with it the lesser-included power to issue findings of fact and conclusions of law in such proceedings.

As discussed above, however, there is a clearer path to the conclusion that bankruptcy courts may issue findings and conclusions in fraudulent conveyance suits. Once Section 157(b)(2)(H) has been stricken from the statute, fraudulent conveyance actions are *non-core* matters. And Section 157(c)(1) expressly grants bankruptcy courts the power to enter findings and conclusions in non-core matters.

Petitioner objects (at 53) that "[f]raudulent conveyance claims are expressly denominated 'core' by Section

157(b)(2)(H), and therefore do not fit within the framework established by Section 157(c)(1)." But, as petitioner would surely agree, Section 157(b)(2)(H) is unconstitutional. Accordingly, it must be stricken. It is irrelevant to the task of interpreting the constitutional remainder of the statute. Petitioner likewise misses the point when it asserts (at 53) that a proceeding cannot be "'simultaneously core and yet only related to the bankruptcy case.'" That is so. But a fraudulent conveyance suit against a non-creditor is *not* core on a proper understanding of Article III and after severance of the unconstitutional subparagraph of Section 157(b)(2).

Ultimately, petitioner's analysis is flawed by the failure to recognize that the 1984 Act was intended to correct the *Marathon* problem, while granting bankruptcy courts all the power to decide bankruptcy matters that they may constitutionally exercise. Because petitioner disregards the Act's context and purpose, it approaches the question as if the statutory categories of "core" and "non-core" are wholly unrelated to the constitutional principles they were intended to implement.[10] If the statute, cleansed of its unconstitutional provisions, is read to comport with the constitutional principles it embodies, there is no justification for the impractical and burdensome outcome petitioner advocates, and no need to permit one mislaid stone to cause the entire edifice to crumble.

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[10] The analysis of the one court of appeals that has adopted petitioner's position, *see Wellness Int'l Network, Ltd.* v. *Sharif*, 727 F.3d 751 (7th Cir. 2013), suffers from the same defect. Because it analyzed the statute in a manner divorced from the constitutional principles that underlie it, the court believed that it was forced to reject what it conceded was "perhaps the most practical and equitable remedy"—to treat the bankruptcy court's unconstitutionally entered final judgment as findings and conclusions. *See id.* at 776.

II. BANKRUPTCY COURTS MAY "HEAR AND DETERMINE" FRAUDULENT CONVEYANCE SUITS WITH THE CONSENT OF THE PARTIES, BUT SUCH CONSENT MUST BE EXPRESS

Because bankruptcy courts may enter findings and conclusions in fraudulent conveyance suits for de novo review by the district court—and because the district court did in fact review the bankruptcy court's grant of summary judgment to respondent de novo, *see* Pet. App. 45a—this Court need go no further to affirm the judgment below. Petitioner received de novo consideration of the claim against it by an Article III court. Article III entitles petitioner to nothing more. It therefore makes no difference to the outcome of this case whether or not petitioner could, or did, consent to bankruptcy court adjudication.

Were the Court to reach the question, however, it should hold that a bankruptcy court may constitutionally hear and determine non-core matters—including fraudulent conveyance suits—with the consent of the parties pursuant to Section 157(c)(2). That conclusion is most consistent with this Court's Article III jurisprudence, which holds that in the absence of meaningful encroachment on or diminution of the prerogatives of the judicial branch, the consent of the parties to a non-Article III resolution of a private-right dispute does not offend the separation of powers. Respondent is incorrect, however, in asserting that in the bankruptcy context such consent may be implied. Bankruptcy Rule 7012(b) makes clear that such consent must be "express," and there is no reason for this Court to hold that the rule means anything other than what it says.

A. Litigants May Consent To A Bankruptcy Court's Entry Of Final Judgment In A Non-Core Matter

As respondent capably explains (at 21-44), bankruptcy courts' adjudication of private-right controversies with the litigants' consent, as Congress authorized in Section 157(c)(2), does not offend Article III.

In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), this Court explained that Article III, § 1, serves to protect "primarily personal, rather than structural, interests." *Id.* at 848. "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights." *Id.*

To be sure, Article III, § 1, also plays a structural role, "safeguard[ing] the role of the Judicial Branch in our tripartite system by barring congressional attempts [to] 'emasculat[e]' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Schor*, 478 U.S. at 850 (citation omitted). It may also restrain the judicial branch from abdicating its own core constitutional duties. *See, e.g.*, *Peretz* v. *United States*, 501 U.S. 923, 956 (1991) (Scalia, J., dissenting). "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." *Schor*, 478 U.S. at 850-851. The question, therefore, is whether a particular grant of authority to a non-Article III tribunal poses such a great risk of encroachment on the judicial branch, or abdication of that branch's authority, that it cannot constitutionally be tolerated even if the litigants consent.

This Court has never previously identified such a case. When it has struck down a grant of power to a non-Article III tribunal, it has always been in cases in which litigants had no option to proceed before a constitutional court. In *Marathon*, for example, this Court's holding was that "Congress may not vest in a non-Article III court the power to adjudicate, render a final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Thomas*, 473 U.S. at 584 (emphasis added). *Stern*, too, struck down Section 157(b)(2)(C) as applied in that case, and distinguished *Schor*, in part because the objecting creditor "did not truly consent to resolution of [the debtor's] claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

Similarly, consent has long been the lynchpin of the magistrate system, whose constitutionality has not been impugned by this Court. *Compare Gomez* v. *United States*, 490 U.S. 858, 872 (1989) (holding, on constitutional avoidance grounds, that Congress "did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties" where the defendant did not consent), *with Peretz*, 501 U.S. at 932 (holding that a magistrate may constitutionally exercise that duty where the defendant did consent). "[T]he litigant's consent makes the crucial difference." *Peretz*, 501 U.S. at 932. As a personal right, the defendant's right to have an Article III judge preside over voir dire is waivable. *Id.* at 937. Moreover, a magistrate's presiding over jury selection with the defendant's consent does not offend the "structural protections provided by Article III" because "[m]agistrates are appointed and subject to removal by Article III judges"; "[t]he 'ultimate decision' whether to invoke the magistrate's as-

sistance is made by the district court, subject to veto by the parties"; and "'the entire process takes place under the district court's total control and jurisdiction.'" *Id.*[11]

The same is true here. The 1984 Act did not "'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. To the contrary, the Act carefully and deliberately ensured that Article III district courts would exercise a full measure of control over bankruptcy proceedings. *Cf. id.* at 855 (examining the "congressional plan at issue and its practical consequences" before upholding the grant of authority). Bankruptcy courts are "unit[s]" of the district courts, 28 U.S.C. § 151, and bankruptcy judges are appointed—and may be removed—by Article III judges, *id.* § 152(a), (e). The district courts enjoy extensive supervisory authority over the administration of bankruptcy

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[11] Indeed, this Court has long approved similar practices in an array of contexts. *See Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889) (approving practice in chancery courts where "the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law" and concluding that decision of master had same effect as final judgment from federal court); *Newcomb* v. *Wood*, 97 U.S. (7 Otto) 581, 583 (1878) ("The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem.* In such an agreement there is nothing contrary to law or public policy."); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 127, 131 (1864) (upholding referrals of civil matters for adjudication by non-Article III entities where "the parties agreed in writing to refer the cause to a referee 'to hear and determine the same and all the issues therein, with the same powers as the court'" and noting that the "[p]ractice of referring pending actions under a rule of court, by consent of the parties, was well known at common law").

proceedings: Bankruptcy courts hear no matter unless the district court has made an appropriate reference, *id.* § 157(a); the district court may withdraw that reference for cause at any time, *id.* § 157(d); and the district court *must* withdraw the reference of any proceeding that requires meaningful interpretation of a federal statute (other than the Bankruptcy Code) affecting interstate commerce, *id.* And, of course, all bankruptcy court judgments are reviewable by Article III courts. *Id.* § 158. While these provisions are inadequate to render constitutional bankruptcy courts' *nonconsensual* entry of final judgment in non-core proceedings, *see Stern*, 131 S. Ct. at 2619, they demonstrate that the 1984 Act does not strip the judicial power of the United States from constitutional courts in a way that raises concerns consent cannot address.

Like bankruptcy courts, magistrates enter final judgments with the consent of the litigants in proceedings that would otherwise be the exclusive province of Article III courts, and have long done so without constitutional controversy. *See* 28 U.S.C. § 636(c)(1); *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) ("We hold that consensual reference of a civil case to a magistrate is constitutional[.]"). The constitutionality of a magistrate judge's authority under 28 U.S.C. § 636(c)(1) to enter final judgment with the parties' consent has been upheld by every court of appeals to address the issue. *See* American Bar Association Resolution 109, at 5 (Feb. 11, 2013) (collecting cases); *see also id.* at 10 (resolving that "bankruptcy judges may constitutionally enter final orders and judgments in *Stern*-type proceedings upon the consent of the parties").

Indeed, petitioner concedes (at 29, 33) that, as *Schor* held, "separation of powers concerns are dimin-

ished" when a congressional grant of power to a non-Article III court includes a requirement of litigant consent. 478 U.S. at 855. Petitioner attempts (at 32) to distinguish the magistrate system on that basis. But there is no such distinction: The 1984 Act clearly provides that a bankruptcy judge may hear and determine non-core proceedings (such as fraudulent transfer suits against non-creditors) only "with the consent of all parties." 28 U.S.C. § 157(c)(2). In fact, as discussed further below, *see infra* Part II.B, the Federal Rules of Bankruptcy Procedure require parties to provide *express* consent to entry of judgment by the bankruptcy court in non-core matters, *see* Fed. R. Bankr. P. 7012.

There can thus be no argument that the magistrate system has a more robust consent requirement or differs in any way meaningful to the constitutional analysis. If adopted, petitioner's approach would logically require the invalidation of the magistrate system, as well as Section 157(c)(2). Petitioner's argument thus belies this Court's caution that its holding in *Stern* "does not change all that much," 131 S. Ct. at 2620, and would work nothing short of a revolution in the federal courts. It should be rejected.

B. A Litigant's Consent Must Be Express

While respondent is correct that a litigant may consent to having a bankruptcy court adjudicate a fraudulent conveyance suit against a non-creditor, implied consent is insufficient. The Federal Rules of Bankruptcy Procedure require such consent to be express.

Consent to having a non-Article III judge enter final judgment in a private-right dispute is no small thing. It is a relinquishment of the right to have an Article III judge preside over a critical—indeed, determi-

native—stage of the proceedings. As with respect to federal magistrates, consent is "[a] critical limitation" on the bankruptcy court's "expanded" authority. *Gomez*, 490 U.S. at 870.

Congress accordingly required that "the consent of all parties to the proceeding" be obtained before a bankruptcy court may enter final judgment in a non-core proceeding. 28 U.S.C. § 157(c)(2). And the Federal Rules of Bankruptcy Procedure provide, in clear and unambiguous terms, that "in non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order *except with the express consent of the parties.*" Fed. R. Bankr. P. 7012(b) (emphasis added); *see also* Fed. R. Bankr. P. 7012 (1987 adv. comm. note) ("A final order of judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties *expressly* consent." (emphasis added)).

The rules further require parties to state in the complaint and responsive pleading whether the action is core or non-core and, if non-core, whether the party consents to entry of final orders or judgment by the bankruptcy judge.[12] And the rules make clear that "[f]ailure to include the statement of consent does not constitute consent. Only *express consent* in the pleadings or otherwise is effective to authorize entry of a fi-

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[12] *See* Fed. R. Bankr. P. 7008(a) (providing that complaints filed in adversary proceedings "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge"); Fed. R. Bankr. P. 7012(b) (providing that responsive pleadings filed in adversary proceedings "shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge").

nal order or judgment by the bankruptcy judge in a non-core proceeding." Fed. R. Bankr. P. 7008 (1987 adv. comm. note) (emphasis added).

As this Court has observed, these rules are not mere suggestions—they are commands. *See Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (Federal Rules of Bankruptcy Procedure are mandatory); *see also Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) ("[I]n every pertinent respect, ... [a Federal Rule of Criminal Procedure is] as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). Accordingly, only express consent is sufficient to authorize entry of final judgment by the bankruptcy court in non-core matters. *See In re Lyondell Chem. Co.*, 467 B.R. 712, 722 (S.D.N.Y. 2012) (stating that in light of Federal Rule of Bankruptcy Procedure 7012(b) "mere implied consent appears to be insufficient"); *In re Madison Bentley Assocs., LLC*, 474 B.R. 430, 436 (S.D.N.Y. 2012) (same).

The court of appeals was mistaken in concluding that *Roell* v. *Withrow*, 538 U.S. 580 (2003), warrants a different result. Pet. App. 31a. *Roell* held—as a matter of statutory construction—that implied consent may satisfy 28 U.S.C. § 636(c)(1), a conclusion it reached only after determining that implied consent was consistent with "the text and structure of [§ 636] as a whole," and that an express consent rule would "'frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts.'" 538 U.S. at 587, 590-591. The Court cautioned, however, that consent should be implied only in limited, exceptional circumstances. *Id.* at 591 n.7 ("district courts remain bound by the procedural requirements of § 636(c)(2) and Rule

73(b)"). *Roell* did not address or interpret the bankruptcy rules, and it simply is not possible to read those rules to permit implied consent.

The circumstances of *Roell* were also quite different from those here. The party raising the constitutional challenge (Withrow) *expressly* consented to adjudication by the magistrate and then waited until after he had lost at trial to argue that the magistrate lacked the authority to enter a final judgment because opposing counsel had not done the same. *See Roell*, 538 U.S. at 582-583. The Court thus found that Article III's protections could not be wielded by a *consenting* party as a tactical maneuver. *See id.* at 590 ("Withrow ... received the protection intended by the statute."). The Court had no opportunity to address a situation in which the complaining party has not expressly consented to adjudication by a non-Article III court.

Nor will adhering to the plain language of the bankruptcy rules create a risk of "sandbagging." Respondent is correct (at 4) that petitioner failed to comply with Rule 7012(b)'s requirement that it indicate in its responsive pleading whether it consented to have the bankruptcy court "hear and determine" the matter. But respondent could have sought to enforce the rule in the bankruptcy court and demand that petitioner provide an express statement one way or the other at the outset of the litigation. The rules thus operate to permit the diligent litigant to avoid being "sandbagged."

Of course, there are also other protections against a party's lying in wait on the issue of consent until after appeals have been taken and the merits decided, such as the ordinary principle of appellate waiver. As this Court has explained, "'[n]o procedural principle is more familiar ... than that a constitutional right,' or a right of

any other sort, 'may be forfeited ... by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Stern*, 131 S. Ct. at 2608 (quoting *United States* v. *Olano*, 507 U.S. 725, 731 (1993)). Thus, even though a party's failure to object to entry of judgment does not constitute consent, on review of that judgment a party must raise—or forfeit according to the ordinary doctrine of appellate waiver—the argument that consent was not properly obtained.[13]

Whether the doctrine of appellate waiver could—or should—apply here is a question on which amici take no position. This Court should, however, reject the invitation to disregard the clear language of the federal bankruptcy rules requiring "express" consent to a non-Article III adjudication of a private-rights dispute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[13] As this Court noted in *Stern*, the question whether the bankruptcy court has the power to enter final judgment is not one of subject-matter jurisdiction. *See* 131 S. Ct. at 2607 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject-matter jurisdiction.") (citation omitted). Accordingly, there is no reason to treat *Stern*-type objections as inherently non-waivable on appeal.

Respectfully submitted.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

I. *AMICUS CURIAE* 1

II. SUMMARY OF ARGUMENT 2

III. ARGUMENT 4

A. THE STATUTE IS PRESUMED TO BE CONSTITUTIONAL 6

B. NEITHER *STERN* NOR *GRANFINANCIERA* CONSIDERED THE CONSTITUTIONALITY OF 28 U.S.C. § 157(b)(2)(H) 8

1. The *Stern* Ruling Was Isolated And Narrow 8

2. *Granfinanciera* Does Not Preclude A Finding That Bankruptcy Courts May Enter Judgments In Fraudulent Transfer Actions Brought By A Bankruptcy Trustee 10

Table of Contents

Page

C. UPON FULL CONSIDERATION, THE SUPREME COURT IS LIKELY TO UPHOLD THE AUTHORITY OF BANKRUPTCY COURTS TO FINALLY ADJUDICATE FRAUDULENT TRANSFER CLAIMS 12

1. Bankruptcy Fraudulent Transfer Actions Are Grounded In Federal Bankruptcy Law 14

2. Bankruptcy Fraudulent Transfer Actions Fall Within The Broad *In Rem* Jurisdiction Recognized By The Supreme Court 16

D. TREATMENT OF FRAUDULENT TRANSFER ACTIONS AS NON-CORE IS INCONSISTENT WITH *STERN'S* NARROW RULING 20

E. CONSENT IS SUFFICIENT TO CONFER AUTHORITY IN NON-CORE MATTERS 21

TABLE OF CITED AUTHORITIES

Page

CASES

Begier v. I.R.S.,
496 U.S. 53 (1990) 17

Central Va. Comm. Coll. v. Katz,
546 U.S. 356 (2006) ..... *passim*

City Fire Equip. Co.
v. Ansul Fire Prot. Wormald U.S., Inc.,
125 B.R. 645 (N.D. Ala. 1989) 12

Cohens v. Virginia,
19 U.S. 264 (1821) 6, 7

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 22

Feuerbacher v. Moser,
No. 4:11–CV–272, 2012 WL 1070138
(E.D. Tex. Mar. 29, 2012) 22

Glinka v. Abraham & Rose Co.,
1994 WL 905714 (D. Vt. June 2, 1994) 12

Granfinanciera v. Nordberg,
492 U.S. 33 (1989) ..... *passim*

In re Apex Long Term Acute Care—Katy, L.P.,
465 B.R. 452 (Bankr. S.D. Tex. 2011) 11, 16

Cited Authorities

Page

In re BankUnited Fin. Corp.,
462 B.R. 885 (Bankr. S.D. Fla. 2011) 9

In re Blixseth,
No. 10–0088, 2011 WL 3274042
(Bankr. D. Mont. Aug. 1, 2011).....22

In re Bujak,
No. 11-6038-JDP, 2011 WL 5326038
(Bankr. D. Idaho Nov. 3, 2011) 9

In re Custom Contractors, LLC,
462 B.R. 901 (Bankr. S.D. Fla. 2011) 9, 12

In re DPH Holdings Corp.,
448 Fed App'x 134, 2011 WL 5924410
(2d Cir. Nov. 29, 2011) 13

In re Feiler,
218 F.3d 948 (9th Cir. 2000).....19

In re Fietz,
852 F.2d 455 (9th Cir. 1988).....21

In re Heller Ehrman LLP,
No. 10-3203DM, 2011 WL 4542512
(Bankr. N.D. Cal. Sept. 28, 2011).....9

In re International Auction and Appraisal Servcs., LLC,
493 B.R. 460 (Bankr. M.D. Pa. 2013) 22

Cited Authorities

Page

In re MortgageAmerica Corp.,
714 F.2d 1266 (5th Cir. 1983) 19

In re Peacock,
455 B.R. 810 (Bankr. M.D. Fla. 2011) 9

In re Pearson Indus., Inc.,
178 B.R. 753 (Bankr. C.D. Ill. 1995) 19

In re Refco, Inc.,
461 B.R. 181 (Bankr. S.D.N.Y. 2011) 9, 12, 15, 16

In re Safety Harbor Resort & Spa,
456 B.R. 703 (Bankr. M.D. Fla. 2011) 9, 12

In re Salander O'Reilly Galleries,
453 B.R. 106 (Bankr. S.D.N.Y. 2011) 9

In re Wilderness Crossings, LLC,
No. 11–80417, 2011 WL 5417098
(Bankr. W.D. Mich. Nov. 8, 2011) 9

Katchen v. Landy,
382 U.S. 323 (1966) 13-14

Langenkamp v. Culp,
498 U.S. 42 (1990) 5, 14

Moore v. Bay,
284 U.S. 4 (1931) 4, 17

Cited Authorities

Page

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 14, 19

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) 21

Reitmeyer v. Meinen (In re Meinen), 232 B.R. 827 (Bankr. W.D. Pa. 1999) 12

Roell v. Withrow, 123 S. Ct. 1696 (2003) 23

Schlossberg v. Comptroller of the Treasury (In re Creative Goldsmiths), 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) 7

Sacred Heart Hosp. v. Dept. of Pub. Welfare (In re Sacred Heart Hospital), 133 F.3d 237 (3d Cir. 1998) 7

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 7

Stein v. Miller, 158 B.R. 876 (S.D. Fla. 1993) 12

Stern v. Marshall, 131 S. Ct. 2594 (2011) ..... *passim*

Cited Authorities

Page

U.S. v. Morrison,
529 U.S. 598 (2000) 6

U.S. v. Whiting Pools, Inc.,
462 U.S. 198 (1983) 17

Union Bank v. Wolas,
502 U.S. 151 (1991) 5

Van Huffel v. Harkelrode,
284 U.S. 225 (1931) 17

STATUTES

Article III to the U.S. Constitution..... 8, 11, 16

Seventh Amendment to the U.S. Constitution.. 5, 10, 11, 16

Eleventh Amendment to the U.S. Constitution..... 7

11 U.S.C. § 101 4

11 U.S.C. § 502(d)..... 10, 13, 14, 15

11 U.S.C. § 541..... 4, 5

11 U.S.C. § 541(a)..... 19

11 U.S.C. § 544..... 4, 15, 16

Cited Authorities

Page

11 U.S.C. § 544(a)(1) 15

11 U.S.C. § 546(e) 15

11 U.S.C. § 547 ..... 15, 16

11 U.S.C. § 548 ..... 15, 16, 19

11 U.S.C. § 548(a)(1) 19

11 U.S.C. § 548(a)(1)(B) 11

11 U.S.C. § 548(a)(2) 11

11 U.S.C. § 549 15

11 U.S.C. § 550 ..... 4, 15, 16, 19

11 U.S.C. § 550(a) 16

11 U.S.C. § 551 15

28 U.S.C. § 157(b)(1) 12

28 U.S.C. § 157(b)(2) 13

28 U.S.C. § 157(b)(2)(A) 13

28 U.S.C. § 157(b)(2)(B) 13

Cited Authorities

Page

28 U.S.C. § 157(b)(2)(C) 8, 10

28 U.S.C. § 157(b)(2)(f) 2

28 U.S.C. § 157(b)(2)(h) ..... *passim*

28 U.S.C. § 157(b)(2)(O) 13

28 U.S.C. § 157(c)(1) 3, 4, 20, 21

28 U.S.C. § 157(c)(2) 3, 4, 21, 22

28 U.S.C. § 586(3) 4

28 U.S.C. § 636 23

28 U.S.C. § 636(c) 4, 23

28 U.S.C. § 1334(b) 21

UFCA § 9(1) 4, 15

UFTA § 7(a)(1) 4, 15

28 C.F.R. § 58.3 4

Supreme Court Rule 37(3) 1

1. *AMICUS CURIAE*

This brief is submitted by the Business Law Section of The Florida Bar (the "Section"), pursuant to the consent to the filing of *amicus curaie* briefs, in support of either party or neither party, filed with the Court on August 27, 2013 in accordance with Supreme Court Rule 37(3)[1]. The Section consists of more than 5,000 members and the impetus for this brief arose from the Section's Bankruptcy/UCC Committee. Although a prior version of this brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on January 11, 2012 consistent with applicable standing board policies, it is tendered solely by the Section and supported by the separate resources of this voluntary organization not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

This brief does not support a particular party. The Section will not address any factual or legal issue raised by this appeal, except the issues of whether (1) a fraudulent transfer action filed by a bankruptcy trustee may be finally adjudicated by a bankruptcy court, and (2) bankruptcy courts can issue final judgments in non-core matters "related to" bankruptcy cases when the parties consent. For almost thirty years, Florida bankruptcy courts

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1. Attorneys authoring the brief on behalf of the Section inlcude Paul Steven Singerman and Roberta A Colton. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. As previously stated, the parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

have finally adjudicated countless fraudulent transfer actions. Because this appeal purports to challenge the jurisdictional underpinnings of those judgments, the Section determined that an *amicus* brief is appropriate.

For many reasons, numerous "Ponzi" and similar fraud cases seem to be ultimately resolved in Florida bankruptcy courts. One such case alone can give rise to hundreds of fraudulent transfer adversary proceedings. Removing those proceedings from bankruptcy courts and transferring them instead to state court or the federal district court (or worse, trying them once in bankruptcy court and then again in federal district court) would have a significant impact on the administration of justice in states such as Florida, where federal and state courts are already struggling with overly crowded dockets. Doing so would also impact the quality of justice for bankruptcy estates that have limited resources, thus impairing the ability of creditors to recover losses.

The Section acknowledges that concern for efficient judicial administration and timely justice alone cannot trump constitutional requirements, but it does caution prudence and restraint in considering the constitutionality of an important and longstanding practice.

II. SUMMARY OF ARGUMENT

Until *Stern v. Marshall*, 131 S. Ct. 2594 (2011), no case law from the Court questioned the long-standing practice of bankruptcy courts entering final orders in fraudulent conveyance actions. Indeed, federal courts worked on the assumption that avoidance actions, designated as "core" proceedings, 28 U.S.C. § 157(b)(2)(f) (preference actions) and (h) (fraudulent transfer actions), could be

adjudicated in the form of final orders by bankruptcy courts. Although *Stern* held that a bankruptcy court could not enter a final judgment on a state law counterclaim that was not necessarily resolved as part of the claims allowance/disallowance process, the Court made clear that this holding was "narrow" and "isolated," and did not "meaningfully change" the division of labor between district and bankruptcy court judges. Given the Court's repeated statements that the holding in *Stern* was narrow, most courts have given that holding a narrow construction. Neither *Stern* nor *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), or any other decision from this Court held, explicitly or implicitly, that bankruptcy courts lacked the constitutional authority to enter final judgments in fraudulent transfer actions. As such, the statute at issue here, 28 U.S.C. § 157(b)(2)(h), should be presumed constitutional. For these reasons, as explained in more detail in the Argument section of this Brief, the Section submits that a fraudulent transfer action prosecuted by a trustee in bankruptcy can be adjudicated in the form of a final order by an Article I bankruptcy court without exceeding that court's authority under the United States Constitution.

The Section further submits that, even where bankruptcy courts cannot constitutionally adjudicate a "core" fraudulent transfer action under *Stern*, such courts can submit proposed findings of fact and conclusions of law for *de novo* review by district courts as they do in non-core matters. This result has been reached by the vast majority of lower courts that have addressed the issue. Yet, in non-core matters that are "related to" bankruptcy cases, the parties' consent allows the bankruptcy court to enter a final order as specifically contemplated by 28 U.S.C. § 157(c)(1) and (2). And nothing in *Stern* addressed,

let alone found, that entry of a final decision in a non-core matter brought by a trustee pursuant to § 157(c)(1) or (2) would violate the Constitution. A contrary determination would call into question long-standing statutes that provide for similar procedures, *i.e.*, 28 U.S.C. § 636(c).

III. ARGUMENT

In a chapter 7 case, such as *Bellingham Insurance Agency, Inc.*, a trustee is appointed to marshal the assets of the estate and to pay the claims of creditors. The trustee is supervised by the Office of the United States Trustee and must provide a bond in favor of the United States.[2] The Bankruptcy Code[3] authorizes the trustee to commence an adversary proceeding to avoid transfers of property that is rightfully property of the bankruptcy estate.[4] Once avoided, a bankruptcy fraudulent transfer (whether property or money) may then be recovered for the benefit of all creditors.[5]

Outside of bankruptcy, a fraudulent transfer claim under state law is generally limited to the amount of a single creditor's claim.[6] In enacting the Bankruptcy Code,

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2. *See generally* 28 U.S.C. § 586(3) and 28 C.F.R. § 58.3.

3. 11 U.S.C. §§ 101 *et seq.*

4. 11 U.S.C. §§ 541, 544.

5. 11 U.S.C. § 550; *see also Moore v. Bay*, 284 U.S. 4 (1931).

6. 43 states and the District of Columbia have adopted the Uniform Fraudulent Transfer Act (the "UFTA") and 2 (New York and Maryland) as well as the U.S. Virgin Islands have adopted the Uniform Fraudulent Conveyance Act (the "UFCA"). Both statutes limit recoveries to the extent of the single creditor's claim. UFTA § 7(a)(1); UFCA § 9(1).

it was the express intent of Congress to end the race to the courthouse and to promote the equal treatment of creditors. *See generally Union Bank v. Wolas*, 502 U.S. 151, 160-61 (1991).

The recovery of fraudulent transfers for the benefit of all creditors is a fundamental aspect of the bankruptcy scheme enacted by Congress. A bankruptcy estate is defined as "all legal or equitable interests of the debtor," and includes the recovery of fraudulently transferred property. 11 U.S.C. § 541. The Judicial Code of the United States clearly provides that a fraudulent transfer action, as well as an action for recovery of the property, lies within the "core" jurisdiction of the United States Bankruptcy Courts. 28 U.S.C. § 157(b)(2)(H). For years, bankruptcy courts have tried and entered final judgments in fraudulent transfer actions.

In 1989, the Court ruled in *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), that a defendant in a fraudulent transfer action seeking a money judgment, as opposed to the return of a tangible object or land, has a right to a jury trial under the Seventh Amendment of the Constitution. That right was quickly limited by the Court to actions where the defendant had not filed a claim in the bankruptcy case. *See Langenkamp v. Culp*, 498 U.S. 42 (1990) (by filing a claim, a preference defendant waives the jury trial right).

Since *Granfinanciera* was decided in 1989, the "core" jurisdiction of a bankruptcy court to adjudicate a fraudulent transfer action was not seriously questioned until the Court's 2011 decision of *Stern v. Marshall*, 131 S. Ct. 2594 (2011). In *Stern*, the Court ruled that a bankruptcy court could not enter judgment on a state

law counterclaim that was not necessarily resolved as part of the bankruptcy claims resolution process. The Court plainly stated that its ruling was "narrow" and "isolated." *Id.* at 2620. Nevertheless, litigants anxious to frustrate the efforts of bankruptcy trustees and avoid or delay the return of fraudulently transferred assets have seized on dicta in *Stern* and *Granfinanciera* to conclude that statutory law recognizing a bankruptcy court's "core" jurisdiction to adjudicate such actions is unconstitutional. This conclusion is unfounded. It is an overreaction to dicta in two narrowly decided cases, and it ignores a substantial body of case law that supports the constitutional underpinnings of 28 U.S.C. § 157(b)(2)(H).

A. THE STATUTE IS PRESUMED TO BE CONSTITUTIONAL

In considering the constitutionality of any statute, restraint and deference should be exercised.

> Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. With this presumption of constitutionality in mind, we turn to the question ...

U.S. v. Morrison, 529 U.S. 598, 607 (2000) (citations omitted). In view of this standard, dicta should not be the basis for striking down a law duly enacted by Congress. For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. 264 (1821), the Court is not bound to follow its own dicta:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Id. at 399. The danger of elevating dicta is well illustrated by the aftermath of the Court's case of *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), which applied Eleventh Amendment sovereign immunity to the Indian Commerce Clause.

After *Seminole Tribe*, lower courts simply assumed, based on the Court's seemingly clear dicta that the same Eleventh Amendment analysis would apply to the Bankruptcy Clause.[7] It was not until the 2006 case of *Central Va. Comm. Coll. v. Katz*, 546 U.S. 356 (2006), that the Court directly addressed the issue. With the benefit of full briefing and consideration of the issues presented, the Court concluded the assumption that *Seminole Tribe* applied to bankruptcy cases was incorrect. The Court said that although statements in *Seminole Tribe* "reflect an assumption that the case's holding would apply to the [Bankruptcy] Clause, careful study and reflection convince this Court that that assumption was erroneous." *Id.* at 363.

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7. *See, e.g., Schlossberg v. Comptroller of the Treasury (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998); *Sacred Heart Hosp. v. Dept. of Pub. Welfare (In re Sacred Heart Hospital)*, 133 F.3d 237 (3d Cir. 1998).

B. NEITHER *STERN* NOR *GRANFINANCIERA* CONSIDERED THE CONSTITUTIONALITY OF 28 U.S.C. § 157(b)(2)(H)

1. The *Stern* Ruling Was Isolated And Narrow

Stern held that a bankruptcy court "lacked the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. The Court reasoned that the bankruptcy court had the statutory authority to consider Vickie Lynn Marshall's (a/k/a Anna Nicole Smith) counterclaim, but that the statute itself (28 U.S.C. § 157(b)(2)(C)) was unconstitutional, as applied to her state law counterclaim. *Id.* at 2597. Because the counterclaim could not be resolved in the process of ruling on E. Pierce Marshall's proof of claim for defamation, it had to be tried by an Article III court. *Id.* at 2611. The decision was 5-4.

Writing for the Court, Chief Justice Roberts stressed the narrowness of the holding and minimized its practical impact in his final comments:

> Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, *in one isolated respect,* exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.

Id. at 2620 (emphasis original). The Court emphasized that "the question presented here is a 'narrow' one" and "our decision today does not change all that much" in bankruptcy law. *Id.* Accepting this guidance, many courts have narrowly construed the *Stern* holding.[8]

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8. *See, e.g., In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) ("The Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance ... the Supreme Court's holding in *Stern* was very narrow"); *In re Peacock*, 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011); *In re BankUnited Fin. Corp*, 462 B.R. 885, 892 (Bankr. S.D. Fla. 2011) ("As a bankruptcy court, I will not [make decisions] based on extrapolations of what the Chief Justice took great pains to emphasize is the narrow holding of *Stern*."); *In re Refco, Inc.*, 461 B.R. 181, 191(Bankr. S.D.N.Y. 30, 2011); *In re Wilderness Crossings, LLC*, No. 11–80417, 2011 WL 5417098, at *2 (Bankr. W.D. Mich. Nov. 8, 2011) ("Our common law tradition counsels in favor of hewing closely to the holdings of higher authority and although the multifarious rationales in *Stern* are quite broad, the holding is mercifully narrow."); *In re Bujak*, No. 11-6038-JDP, 2011 WL 5326038 at *2 (Bankr. D. Idaho Nov. 3, 2011) ("Despite what the majority actually said in *Stern*, some insist that the decision foretells a jurisdictional Armageddon for the bankruptcy courts. This Court disagrees. It instead chooses to believe the Supreme Court's own assessment of the decision's impact, and discounts those who argue that the sky is falling. While the Supreme Court in the future may explain its decision, and could conceivably expand the reach of *Stern*'s constitutional analysis, . . . this Court need not do so. Instead of attempting to predict the future, this Court should carefully apply *Stern*'s holding in its cases, and refrain from extending that holding to facts different from those in Stern."); *In re Salander O'Reilly Galleries*, 453 B.R. 106, 115-16 (Bankr. S.D.N.Y. 2011) ("*Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case."); *In re Heller Ehrman LLP*, No. 10-3203DM, 2011 WL 4542512 (Bankr. N.D. Cal. Sept. 28, 2011); *In re Custom Contractors, LLC*, 462 B.R. 901, (Bankr. S.D. Fla. 2011).

Notably, *Stern* did not involve a fraudulent transfer action at all. Indeed, the Court in *Stern* did not rule that 28 U.S.C. § 157(b)(2)(C) was unconstitutional with respect to all counterclaims. Counterclaims that can be decided as part of the claims allowance process remain subject to the core jurisdiction of a bankruptcy court. Because a claimant who has received a fraudulent transfer is prohibited from having any claim in a bankruptcy case until it is returned, 11 U.S.C. § 502(d), the determination of a fraudulent transfer action may be critical to the claims resolution process. In this regard, *Stern* actually supports the exercise of core bankruptcy court jurisdiction in the case of a preference or fraudulent transfer counterclaim.

2. *Granfinanciera* Does Not Preclude A Finding That Bankruptcy Courts May Enter Judgments In Fraudulent Transfer Actions Brought By A Bankruptcy Trustee

In *Granfinanciera,* the Court held that a party who has not asserted a claim in bankruptcy has the right to a jury trial when sued by a bankruptcy trustee to recover a fraudulent transfer of money. 492 U.S. at 36. The Court analyzed the Seventh Amendment, focusing on the historical nature of the cause of action and the nature of the remedy sought. In holding that the right to a trial by jury survived enactment of the Bankruptcy Code, the Court did not determine whether the bankruptcy court could itself conduct the required jury trial. *Id.* at 50, 64-65. The Court simply held that Congress could not strip a litigant of its jury trial right by assigning the cause of action to a court of equity for adjudication.

Granfinanciera referenced the public rights exception to the requirement of adjudication by an Article III tribunal, and stated that actions "to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2)[9] seem to us more accurately characterized as a private rather than a public right..." 492 U.S. at 55. Ultimately, however, the majority opinion stated that "[t]he sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." *Id.* at 50. Further, at least in the context of a bankruptcy preference claim, one court has already ruled that *Granfinanciera's* "public rights" dicta was implicitly overruled by the Supreme Court's more recent decision of *Central Va. Comm. College v. Katz*, 546 U.S. 356 (2006). *See In re Apex Long Term Acute Care—Katy, L.P.*, 465 B.R. 452 (Bankr. S.D. Tex. 2011).

Notably, *Granfinanciera* did not hold that bankruptcy courts lack jurisdiction or authority to enter final judgments in fraudulent transfer actions. The fact that, in certain limited cases, a defendant may be entitled to a jury trial in no way impacts the jurisdictional basis of the claim. Indeed, many cases have properly drawn the distinction between "the right to a jury trial, at issue in *Granfinanciera*, and the power of a bankruptcy court to issue a final order notwithstanding its Article I status," deciding that the jury trial issue in *Granfinanciera* "did not restrict the bankruptcy courts' power to decide

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9. At the time *Granfinanciera* was decided, § 548(a)(2) provided for the avoidance of constructively fraudulent transfers, now provided for in Section 548(a)(1)(B). Accordingly, the Court's statement does not appear to apply to actual fraud claims.

motions to dismiss and summary judgment motions on fraudulent transfer claims on a final basis."[10] As a practical matter, courts and litigants simply continued to operate under the premise that the bankruptcy courts had the constitutional as well as the statutory power to issue final judgments in fraudulent transfer proceedings.[11] In the twenty years between *Granfinanciera* and *Stern*, no court challenged a bankruptcy court's authority to enter final judgments in fraudulent conveyance actions.[12]

C. UPON FULL CONSIDERATION, THE SUPREME COURT IS LIKELY TO UPHOLD THE AUTHORITY OF BANKRUPTCY COURTS TO FINALLY ADJUDICATE FRAUDULENT TRANSFER CLAIMS

Section 157(b)(1) of title 28 empowers bankruptcy judges, by referral from the district court, to hear and determine all cases under title 11, and all core proceedings arising under title 11 or arising in or related to a case under title 11. By their nature, proceedings can be

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10. *In re Refco*, 461 B.R. at 190. *See, e.g., Glinka v. Abraham & Rose Co.*, 1994 WL 905714, at *20-24 (D. Vt. June 2, 1994); *Stein v. Miller*, 158 B.R. 876, 880 (S.D. Fla. 1993); *City Fire Equip. Co. v. Ansul Fire Prot. Wormald U.S., Inc.*, 125 B.R. 645, 649 (N.D. Ala. 1989) (en banc); *Reitmeyer v. Meinen (In re Meinen)*, 232 B.R. 827, 833 (Bankr. W.D. Pa. 1999). Cases in which a jury trial is requested are generally pre-tried by the bankruptcy court and the jury trial subsequently conducted by the district court.

11. *See In re Refco*, 461 B.R. 181 (Bankr. S.D.N.Y. 2011).

12. *See In re Safety Harbor Resort & Spa*, 456 B.R. 703 (Bankr. M.D. Fla. 2011); *In re Custom Contractors*, 462 B.R. at 907-08.

core if either "(1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings or (2) the proceedings directly affect a core bankruptcy function." *In re DPH Holdings Corp.*, 448 Fed. App'x 134, 136, 2011 WL 5924410, at *1 (2d Cir. Nov. 29, 2011) (internal quotations omitted). Section 157(b)(2) provides a non-exhaustive list of core proceedings, including: "matters concerning the administration of the estate," proceedings seeking the "allowance or disallowance of claims against the estate," and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship." 28 U.S.C. § 157(b)(2)(A), (B), (O). Section 157(b)(2)(H) adds "proceedings to determine, avoid, or recover fraudulent conveyances" as core proceedings.

Whether a proceeding is core is irrelevant for determining jurisdiction. *Stern,* 131 S. Ct. at 2607 ("That allocation [of core and non-core] does not implicate questions of subject matter jurisdiction"). As long as a proceeding is one or the other, the bankruptcy court has subject-matter jurisdiction. *Stern* addresses the authority of bankruptcy judges over proceedings referred to them by the district court, not bankruptcy subject matter jurisdiction. *Stern* does not question a bankruptcy court's authority to determine state law claims that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 2618.

When a fraudulent transfer defendant has filed a proof of claim, the bankruptcy court's core jurisdiction seems obvious. Unlike the counterclaim in *Stern,* a fraudulent transfer counterclaim is intrinsically tied to the claims resolution process. *See* 11 U.S.C. § 502(d); *see also Katchen*

v. Landy, 382 U.S. 323 (1966); *Langenkamp v. Culp*, 498 U.S. 42 (1990). A fraudulent transfer counterclaim must be adjudicated before the primary claim is allowed against the estate. 11 U.S.C. § 502(d). Accordingly, *Stern* itself supports core jurisdiction where a counterclaim, such as a fraudulent transfer, must be resolved in the claims resolution process.

The more difficult case is when, before filing bankruptcy, the debtor simply gives away his money or property to a friend or relative who makes no claim against the bankruptcy estate. In such a case, the defendant has not submitted to the jurisdiction of the bankruptcy court by filing a proof of claim. Nevertheless, the nature of a fraudulent transfer claim - to recover property improperly transferred - historically and constitutionally supports the conclusion that bankruptcy courts have "core" jurisdiction over such claims. Moreover, such authority is essential to the fundamental bankruptcy functions of gathering property of the estate and distributing it equally among creditors.

1. Bankruptcy Fraudulent Transfer Actions Are Grounded In Federal Bankruptcy Law

The prosecution of avoidance actions such as fraudulent transfers has been "a core aspect of the administration of bankrupt estates since the 18th century. . ." *Katz*, 546 U.S. at 369-70. Unlike the state law tortious interference claim in *Stern*, or even the state law contract action that was the subject of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), fraudulent transfer claims flow from a federal statutory scheme and are "completely dependent upon adjudication of a claim created by federal

law." *In re Refco*, 461 B.R. at 187. Federal law provides the right upon which the remedy for a bankruptcy fraudulent transfer is based. Within the chapter of Title 11 entitled "The Estate," Congress provides for the avoidance of preferences (§ 547), fraudulent transfers (§§ 548 and 544), and unauthorized post-bankruptcy transfers (§ 549). Section 548 is a standalone statute governing fraudulent transfers. Section 544 effectively incorporates state law avoidance powers by granting a bankruptcy trustee the power to avoid transfers that are voidable by a judgment lien creditor. 11 U.S.C. § 544(a)(1). All bankruptcy avoiding powers exist "within a unique statutory framework such as the safe harbor of 11 U.S.C. § 546(e), the recovery and preservation provisions of 11 U.S.C. §§ 550 and 551, and the 'pay or face claim disallowance' rule of 11 U.S.C. § 502(d)." *Id.*

A fraudulent transfer action under §§ 544 or 548, initiated for the benefit of all creditors of the bankruptcy estate, does not exist independent of a bankruptcy case. Outside of bankruptcy, an individual creditor may race to the courthouse to recover transfers, but only to the extent of its own claim. UFTA § 7(a)(1); UFCA § 9(1). Not only is the nature of the remedy different in bankruptcy, but, in fact, the "race to the courthouse" is precisely the conduct that Congress sought to prevent in enacting the Bankruptcy Code. Further, adjudication of a bankruptcy fraudulent transfer claim is a "particularized area of the law" because of the significance of the litigation to the overall case and creditor recoveries, as well as bankruptcy courts' fluency in the Bankruptcy Code's fraudulent transfer statutory scheme. *In re Refco*, 461 B.R. at 187. This is particularly true in cases in which most of the debtor's property has been transferred to third parties

prepetition, "such as the many *Ponzi*- scheme driven cases of recent years, requiring a coordinated response overseen by one judge on behalf of a host of creditor-victims." *Id.* at 188. Also, in Section 550 of the Bankruptcy Code, Congress adopted a unified mechanism for recovery of the property avoided under §§ 548, 544 or even § 547, which has resulted in a complex body of case law, including considerations regarding "initial" versus "mediate" transferees, "good faith," conduits, and allocations for improvements to property. 11 U.S.C. § 550.

2. Bankruptcy Fraudulent Transfer Actions Fall Within The Broad *In Rem* Jurisdiction Recognized By The Supreme Court

Notwithstanding extensive and conflicting dicta, the Court has not directly considered whether avoidance actions, such as preferences and fraudulent transfers, all of which are recovered under 11 U.S.C. § 550, fall within the bankruptcy court's *in rem* jurisdiction. In *Katz*, the Court stated that "it is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in rem*." 546 U.S. at 372. In *Granfinanciera*, the Court concluded that a constructive fraudulent transfer action for money is a legal action for Seventh Amendment purposes but not directly for Article III purposes. As a result, the Court has not had the occasion to fully consider the body of case law, as a whole, which delineates the expansive *in rem* jurisdiction of bankruptcy courts, including the issuance of ancillary *(in personam)* orders necessary to effectuate that jurisdiction. *See In re Apex*, 465 B.R. at 464-65 ("Even if the estate seeks a turnover order under § 550(a), a bankruptcy court may issue such an order 'ancillary to

and in furtherance of the court's *in rem* jurisdiction.'") (citing *Katz*).

Avoidance claims are a core aspect of bankruptcy because of the bankruptcy court's "principally *in rem* jurisdiction." *Katz*, 546 U.S. at 369-70. Indeed, the Court has historically recognized the expansive *in rem* jurisdiction of bankruptcy courts. Justice Holmes concluded in 1931 that "[t]he trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors or which prior to the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." *Moore v. Bay*, 284 U.S. 4 (1931). Shortly thereafter, the Court, through Justice Brandeis, reaffirmed expansive *in rem* jurisdiction in bankruptcy courts with the power and duty to collect, reduce to money through sale, and distribute the *res* of bankruptcy estates. *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931).

In the 1983 case of *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), the Court held that a bankruptcy estate includes property of the debtor seized by a creditor prior to the filing of the bankruptcy case. In the 1990 decision of *Begier v. I.R.S.*, 496 U.S. 53 (1990), the Court further reasoned that "property of the debtor" includes property that would have been part of the estate but for the transfer prior to the commencement of the case, and that the purpose of the avoidance provision is to preserve property includable within the bankruptcy estate.

In *Katz*, the Court held that sovereign immunity does not bar a bankruptcy trustee's avoidance action against a state agency. 546 U.S. at 369-70. Focusing on the *in rem*

jurisdiction of a bankruptcy court, three critical *in rem* functions were identified: "[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Id.* at 363-64.

As noted in *Katz*, "courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications." *Katz*, 546 U.S. at 370. The Court goes on to describe such orders ancillary to this *in rem* jurisdiction as orders directing turnover of preferential transfers, and other orders which facilitate the recovery of transferred property. *Id.* at 372-73. Although the Court stops short of finding the avoidance action against the state agency within the *in rem* jurisdiction of the bankruptcy court, it makes the following observations:

> In some cases, though, the trustee, in order to marshal the entirety of the debtor's estate, will need to recover the subject of the transfer pursuant to § 550(a). A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.
>
> ...it is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in rem*. Whatever the appropriate appellation, those who crafted the Bankruptcy Clause

> would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property. Petitioners do not dispute that that authority has been a core aspect of the administration of bankruptcy estates since at least the 18th century.

Id. at 371-72.

A bankruptcy estate is defined to include all of a debtor's legal and equitable interests "wherever located and by whomever held." 11 U.S.C. § 541(a). In the same chapter of the Code, § 548 effectively expands the *res* of a bankruptcy estate to include property fraudulently transferred within 2 years of the petition. 11 U.S.C. § 548(a)(1). If the property is not returnable in kind, then "if the court so orders," the trustee may obtain a money judgment. 11 U.S.C. § 550.

An avoided transfer is treated "as though the Debtor had never transferred it." *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983). In other words, "[o]nce avoided, the transaction is a nullity and is treated as if it never happened." *In re Feiler*, 218 F.3d 948, 953 (9th Cir. 2000). Further, "the transfer is retroactively ineffective and the transferee legally acquired nothing through it." *In re Pearson Indus., Inc.*, 178 B.R. 753, 759 (Bankr. C.D. Ill. 1995). In this respect, a fraudulent transfer claim in bankruptcy is akin to an action for constructive trust under state law, which arguably gives rise to an equitable interest existing at the commencement of the case. The state law claims for damages in *Stern* and *Northern Pipeline* do not share this characteristic, nor do they give

rise to any equitable property interests. Moreover, unlike a fraudulent transfer or preference, a state law breach of contract claim has no historical basis in bankruptcy.

D. TREATMENT OF FRAUDULENT TRANSFER ACTIONS AS NON-CORE IS INCONSISTENT WITH *STERN'S* NARROW RULING

Since *Stern*, a number of district courts have denied motions to withdraw the reference for final judgment, ordering that the fraudulent transfer action continue in the bankruptcy court for all purposes including trial. Out of caution due to the potential implications of *Stern*, however, those courts have limited the bankruptcy court to entering proposed findings of fact and conclusions of law. This is the statutory procedure followed in non-core cases and requires that the final judgment be entered by the district judge after reviewing *de novo* the bankruptcy court's proposed findings of fact and conclusions of law as to those matters to which any party objected. 28 U.S.C. § 157(c)(1).

Although constitutionally sound, any suggestions that this procedure does not "meaningfully change" the division of labor between bankruptcy judges and district judges, and thus would be consistent with the admonition in *Stern* that its holding was a "narrow" one, is misplaced. To the contrary, the difference in judicial effort to administer hundreds of fraudulent transfer actions in any district would be substantial. Rather than the relatively rare appeal in which a bankruptcy judge's findings of fact are upheld unless clearly erroneous, this new system would mandate *de novo* review in every fraudulent transfer action in which proposed findings of fact and conclusions

of law were submitted and a party objected. Without doubt, this would constitute "meaningful change," directly contrary to *Stern's* conclusion, and may significantly impact the administration of justice in states, like Florida, where judicial resources are already heavily taxed.

E. CONSENT IS SUFFICIENT TO CONFER AUTHORITY IN NON-CORE MATTERS

Regardless of *Stern*, bankruptcy courts are statutorily authorized to hear non-core matters "related to" bankruptcy cases and issue proposed findings of fact and conclusions of law, and if the parties consent, bankruptcy courts can enter final judgments on such non-core matters subject to appellate review. 28 U.S.C. § 157(c)(1) and (2). The Ninth Circuit has adopted the widely-cited *Pacor* test enunciated by the Third Circuit for determining whether a non-core matter is within the scope of a bankruptcy court's "related to" jurisdictional grant provided by 28 U.S.C. § 1334(b). *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988). Under this formulation, a matter is "related to" a bankruptcy proceeding when "*the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.* Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.* (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)) (Italics in original) (internal citations omitted).

There is dispute whether, in respect of core matters in which bankruptcy courts per *Stern* are constitutionally prohibited from issuing final judgments, bankruptcy courts can issue proposed findings of fact and conclusions of law for *de novo* review by district courts. However, while some cases hold that proposed findings of fact and conclusions law cannot be issued in that circumstance, *see, e.g., In re Blixseth*, No. 10–0088, 2011 WL 3274042, *12 (Bankr. D. Mont. Aug. 1, 2011) (holding it had no authority to enter proposed findings of fact and conclusions of law on a "core" fraudulent conveyance claim because it "may not constitutionally hear the fraudulent conveyance claim as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding"), "[m]ost district and bankruptcy courts ... have held that bankruptcy courts have implied authority to issue findings of fact and conclusions of law in core proceedings." *In re International Auction and Appraisal Servcs., LLC*, 493 B.R. 460, 465-66 (Bankr. M.D. Pa. 2013) (citing cases); *Feuerbacher v. Moser*, No. 4:11–CV–272, 2012WL 1070138, *9 (E.D. Tex. Mar. 29, 2012) (noting that "the vast majority of courts to confront the issue have concluded that bankruptcy courts nonetheless have unquestioned authority to submit proposed findings of fact and conclusions of law.")

If consent is not sufficient to allow bankruptcy courts to issue final judgments in core matters, then 28 U.S.C. § 157(c)(2), which allows bankruptcy courts to enter final judgment in non-core matters, is put into question despite this Court's recognition of the "'value of waiver and forfeiture rules' in 'complex' cases." *Stern*, 131 S. Ct. at 2608 (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487-88 n.6 (2008)). This would also bring into question

the Federal Magistrate Statute which allows parties to consent to an Article I judge entering final judgments. *See* 28 U.S.C. § 636(c); *Roell v. Withrow*, 123 S. Ct. 1696 (2003) (a judgment entered by a magistrate judge designated under § 636 based on consent of the parties is to be treated as a final judgment of the district court).

Respectfully submitted this 16th day of September, 2013.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CERTAIN *TOUSA* DEFENDANTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

This Court held in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), that non-Article III bankruptcy courts cannot finally adjudicate certain claims despite their designation as "core" under 28 U.S.C. § 157. The petition for a writ of certiorari presents the question whether litigants nevertheless may consent to the exercise of such authority by bankruptcy courts, and, if so, whether such consent may be implied by their conduct. *Amici* will address the following question:

Whether "implied consent" to the exercise of authority barred by *Stern* can be derived solely from the fact that the litigants did not expressly challenge the bankruptcy court's authority before *Stern* was decided.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Litigants in Pending Cases Can Raise Arguments that Arise Upon Changes in the Law 5

II. This Court's Decision in *Stern v. Marshall* Changed Existing Positive Law by Declaring Part of 28 U.S.C. § 157(b) Unconstitutional 7

III. Litigants in Pending Cases Should Be Allowed to Argue that a Bankruptcy Court Lacked Authority to Issue a Final Judgment Based on Stern 10

CONCLUSION 16

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES

3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.),
Case No. 10-62035-CIV-Moore (S.D. Fla.) 1

Aetna Ins. Co. v. Kennedy,
301 U.S. 389 (1937) 5

Bank of Neb. v. Rose (In re Rose),
483 B.R. 540 (B.A.P. 8th Cir. 2012).....14

Big Horn Cnty. Elec. Coop., Inc. v. Adams,
219 F.3d 944 (9th Cir. 2000).....6

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986) 3

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967) 5, 13, 14

Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP,
462 B.R. 457 (S.D.N.Y. 2011) 8, 9, 10, 14

DSC Commc'ns Corp. v. Next Level Commc'ns,
107 F.3d 322 (5th Cir. 1997).....6

Duck v. Munn (In re Mankin),
823 F.2d 1296 (9th Cir. 1987).....12

Cited Authorities

Page

Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012) 4, 7, 12

Forshey v. Principi, 284 F.3d 1335 (Fed. Cir. 2002) 6

GenCorp, Inc. v. Olin Corp., 477 F.3d 368 (6th Cir. 2007) 5

Gibson v. Tucker (In re G&S Livestock Co.), 478 B.R. 906 (S.D. Ind. 2012) 14

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) ..... *passim*

Hawknet, Ltd. v. Overseas Shipping Agencies, 590 F.3d 87 (2d Cir. 2009) 7

Holzsager v. Valley Hosp., 646 F.2d 792 (2d Cir. 1981) 6

Hormel v. Helvering, 312 U.S. 552 (1941) 6

In re TOUSA, Inc., 422 B.R. 783 (Bankr. S.D. Fla. 2009) 1

In re TOUSA, Inc., 444 B.R. 613 (S.D. Fla. 2011) 1

Cited Authorities

Page

In re TOUSA, Inc.,
680 F.3d 1298 (11th Cir. 2012) 2

Indiana Bell Tel. Co., v. McCarty,
362 F.3d 378 (7th Cir. 2004) 6

Johnson v. Zerbst,
304 U.S. 458 (1938) 5

Krentz v. Robertson Fire Prot. Dist.,
228 F.3d 897 (8th Cir. 2000).....5

Marshall v. Stern (In re Marshall),
600 F.3d 1037 (9th Cir. 2010) 4, 12

Meoli v. Huntington Nat'l Bank
(In re Teleservices Grp., Inc.),
456 B.R. 318 (Bankr. W.D. Mich. 2011)..... 10-11

Messer v. Bentley Manhattan Inc.
(In re Madison Bentley Assocs., LLC),
474 B.R. 430 (S.D.N.Y. 2012) 10

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 13

Northern Pipeline Construction Co. v.
Marathon Pipe Line Co.,
458 U.S. 50 (1982) 8, 11

Cited Authorities

Page

Penson Fin. Servs. v. O'Connell (In re Arbco Capital Mgmt.), 479 B.R. 254 (S.D.N.Y. 2012) 9

Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502 (6th Cir. 2006).....7

Ray v. UNUM Life Ins. Co. of Am., 314 F.3d 482 (10th Cir. 2002) 6

Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP), No. 11-2785, 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011).....10

Sambo's Rests., Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981) 5

Schaff v. R.W. Claxton, Inc., 144 F.2d 532 (D.C. Cir. 1944) 6

Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775 (9th Cir. 2007).....11

Stern v. Marshall, 131 S. Ct. 2594 (2011) ..... *passim*

Wellness Int'l Network, Ltd. v. Sharif, No. 12-1349, --- F.3d ----, 2013 WL 4441926 (7th Cir. Aug. 21, 2013) 3

Page

Wolf v. Nayna Networks, Inc.
(In re Prof'l Satellite and Commc'n LLC),
No. 12cv70 L(MDD), 2012 WL 6012829
(S.D. Cal. Dec. 3, 2012) 10

CONSTITUTION AND STATUTES

U.S. Const. Article III, § 1 3

11 U.S.C. § 544 ..... 1, 12

11 U.S.C. § 548 ..... 1, 12

28 U.S.C. § 157 ..... 8, 12, 14

28 U.S.C. § 157(b) 4, 7, 11

28 U.S.C. § 157(b)(1) 7, 10

28 U.S.C. § 157(b)(2) 7, 10, 11

28 U.S.C. § 157(b)(2)(C) 7-8, 9

28 U.S.C. § 157(b)(2)(H) 8

28 U.S.C. § 157(b)(5) 15

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are members of a group of defendants referred to as the "Transeastern Lenders" in a case currently pending before the United States District Court for the Southern District of Florida, *SV Capital Master Fund Ltd. v. Official Committee of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, Case No. 10-62035-CIV-Moore (the "TOUSA Litigation").[1] The TOUSA Litigation began in July 2008, when the Official Committee of Unsecured Creditors (the "Committee") of TOUSA, Inc., a bankrupt Florida homebuilder, filed an adversary proceeding against the Transeastern Lenders and two other groups of defendants on behalf of certain TOUSA, Inc. subsidiaries, alleging a variety of claims including fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 and Florida and New York state law. (*See* Case No. 08-01435-JKO, ECF No. 243.) The bankruptcy court issued a final judgment in favor of the Committee against the Transeastern Lenders, but the district court "quashed" the judgment and found the Transeastern Lenders not liable. *See generally In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009); *In re TOUSA, Inc.*, 444 B.R. 613 (S.D. Fla. 2011). The Committee appealed to the Eleventh Circuit and the parties completed briefing

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1. The parties have granted blanket consent to the filing of *amicus curiae* briefs, which is on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. The *amici curiae* are identified in the attached appendix.

on June 17, 2011, just six days before the Court issued its decision in *Stern*. Following this Court's decision in *Stern*, the Transeastern Lenders filed notices of supplemental authority before the Eleventh Circuit scheduled oral argument, and the Committee filed a letter in response. (*See* Case No. 11-11071.) Counsel for the Transeastern Lenders and the Committee argued the implications of *Stern* at oral argument before a panel of the Eleventh Circuit.

The Eleventh Circuit reviewed the bankruptcy court's decision as though it were a final judgment, affirmed the bankruptcy court judgment, and remanded the case to the district court to review the bankruptcy court's extensive remedies scheme. *See In re TOUSA, Inc.*, 680 F.3d 1298, 1316 (11th Cir. 2012). Without addressing the parties' arguments regarding *Stern* in any respect, the Eleventh Circuit stated that it was reviewing the bankruptcy court judgment "independently of the district court," and reviewing the bankruptcy court's factual findings for clear error and its equitable determinations for abuse of discretion. *Id.* at 1310; *see also id.* ("The factual findings of the bankruptcy court are not clearly erroneous unless . . . we are left with the definite and firm conviction that a mistake has been made. Neither the district court nor this Court is authorized to make independent factual findings; that is the function of the bankruptcy court.") (internal citations and quotation marks omitted). The Transeastern Lenders filed a petition for rehearing, again raising the issue of *Stern*'s applicability to the TOUSA Litigation, which the Eleventh Circuit denied without comment.

The implication of the *Stern* decision for fraudulent transfer defendants like the Transeastern Lenders,

who did not file proofs of claim against the bankruptcy estates, seems clear—such defendants have a right to Article III adjudication of the claims against them and the bankruptcy court is without authority to enter a final judgment. Accordingly, the district court decision was the final judgment in the TOUSA Litigation and the Eleventh Circuit should have reviewed that decision with deference, rather than "independently." The Transeastern Lenders agree with petitioner that the right to adjudication of a private right by an Article III court cannot be waived (*see* Pet. Br. at 25-27),[2] but submit this brief on the sole issue of whether, assuming *arguendo* that right can be waived, such a waiver may be implied from the mere fact that a litigant did not argue, prior to this Court's decision in *Stern*, that the bankruptcy court's exercise of final adjudicative authority was unconstitutional.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Ninth Circuit held below that under this Court's decision in *Stern*, bankruptcy courts do not have the authority to enter final judgments on fraudulent conveyance claims asserted against non-creditors to the

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2. *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986) (stating that "Article III, § 1 safeguards the role of the Judicial Branch" and prevents "the encroachment or aggrandizement of one branch at the expense of the other" and "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty"); *Wellness Int'l Network, Ltd. v. Sharif*, No. 12-1349, --- F.3d ----, 2013 WL 4441926, at *18 (7th Cir. Aug. 21, 2013) (holding that a litigant cannot waive an Article III objection to a bankruptcy court's entry of final judgment in a core proceeding).

bankruptcy estate. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 565 (9th Cir. 2012) ("*Bellingham*"), Pet. App. 23a. The court further held, however, that petitioner Executive Benefits Insurance Agency ("EBIA") waived its objection to the bankruptcy court's adjudication because it did not assert the objection in the bankruptcy court, *even though Stern* had not yet been decided. *Id.* at 568. According to the Ninth Circuit, EBIA should have anticipated the holding in *Stern* based on this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), as well as the Ninth Circuit's own decision in *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010). *Bellingham*, Pet. App. 32a. If this Court rejects EBIA's submission that a litigant cannot consent by implication to bankruptcy court adjudications barred by *Stern*, the Court should nevertheless hold that EBIA's conduct here did not qualify as implied consent. EBIA's conduct—an omission, actually—was simply the failure to raise a *Stern* objection before *Stern* was decided. Under this Court's own precedents, and as a matter of basic fairness and common sense, the failure to assert a right before the law recognizes it cannot be considered a knowing and intelligent waiver of that right. *Stern* gave EBIA a right—*viz.*, the right not to be subject to the bankruptcy court's final adjudicative power—that did not exist under controlling law when EBIA was litigating before the bankruptcy court. Indeed, existing judicial precedent *denied* EBIA that right, as did the express language of 28 U.S.C. § 157(b). EBIA did not impliedly consent to the bankruptcy court's exercise of unlawful authority by failing to raise an argument that contradicted existing law. The failure to assert a presently-nonexistent right is not a knowing waiver of that right.

ARGUMENT

I. Litigants in Pending Cases Can Raise Arguments that Arise Upon Changes in the Law

If the Court concludes, contrary to EBIA's view, that a party can waive the constitutional error under *Stern* of a bankruptcy court entering final judgment on a private right claim, the Court should make clear that such a waiver must be clear and unequivocal, and cannot be "implied" by the mere fact that the party did not raise a *Stern* objection even before *Stern* was decided.

The law is well-settled that "an effective waiver must . . . be one of a 'known right or privilege.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 908 & n.8 (8th Cir. 2000) (knowing and voluntary waiver standard applies in both civil and criminal contexts). As a general matter, "courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937)).

A closely related principle is that where there is an intervening change in the law, an exception to normal waiver rules "exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). As this Court held in *Curtis Publishing*, a party does not waive a "known right" simply by failing to assert the right before it was recognized in a

subsequent decision. 388 U.S. at 143-45; *see also Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941) (exception to waiver exists in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result"). The federal circuits have repeatedly reiterated this common-sense point: "Where the Supreme Court decides a relevant case while litigation is pending . . . omission of an argument based on the Supreme Court's reasoning does not amount to a waiver . . . ." *Indiana Bell Tel. Co., v. McCarty*, 362 F.3d 378, 390 (7th Cir. 2004).[3] As the Second Circuit observed,

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3. *See also Ray v. UNUM Life Ins. Co. of Am.*, 314 F.3d 482, 487 (10th Cir. 2002) ("[A]n intervening change in the law permits appellate review of an issue not raised below."); *Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir. 2002) ("[D]ecision of an issue not decided or raised below is permitted when there is a change in the jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court."); *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000) (rejecting waiver theory and applying principles from intervening decision where plaintiff altered its stance once decision was issued, noting "an exception to the waiver rule exists for intervening changes in the law"); *DSC Commc'ns Corp. v. Next Level Commc'ns*, 107 F.3d 322, 326 & n.2 (5th Cir. 1997) (applying principles from case decided after oral argument, stating "[w]e are unwilling to ignore this important clarification of the law, and perpetuate incorrect law, merely because [the case] was decided after briefing and oral argument in this case"); *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) ("a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made"); *Schaff v. R.W. Claxton, Inc.*, 144 F.2d 532, 533 (D.C. Cir. 1944) (finding that the "appellant did not have a fair chance to raise and press at the trial" an argument based on a decision in another case issued after the trial).

"the doctrine of waiver demands conscientiousness, not clairvoyance, from parties," and thus a party should be allowed to assert a new objection on appeal when there is a "changed legal landscape." *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92-93 (2d Cir. 2009).

These principles reflect a basic point of fairness, *viz.*, a litigant "can hardly be faulted for failing to raise an argument before there was legitimate legal support for such an argument." *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 516 (6th Cir. 2006). But there is also an equally important practical consideration, for lawyers and courts alike: without an exception to normal waiver rules for intervening authority, "[p]arties would be forced to . . . litter their pleadings with every argument which might conceivably be adopted during the pendency of a proceeding." *Id.* Lawyers can and should be creative in their advocacy, but they—and their clients—should not be punished for keeping their creativity within the clear boundaries of existing law.

II. This Court's Decision in *Stern v. Marshall* Changed Existing Positive Law by Declaring Part of 28 U.S.C. § 157(b) Unconstitutional

According to 28 U.S.C. § 157(b)(1), bankruptcy courts have the authority to "hear and determine . . . all core proceedings" and "enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1). Section 157(b)(2) provides a non-exclusive list of "core" proceedings that includes "counterclaims by the estate against persons filing claims against the estate," at issue in *Stern*, and "proceedings to determine, avoid, or recover fraudulent conveyances," at issue in *Bellingham*. 28 U.S.C.

§ 157(b)(2)(C) & (H). *Stern* effected a change in the existing positive law by declaring that—despite the language of § 157(b)—bankruptcy courts lack *constitutional* authority to issue final judgments on state law counterclaims that would not be resolved in the process of ruling on a creditor's proof of claim. *Stern*, 131 S. Ct. at 2620.

The *Stern* Court relied predominantly on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Granfinanciera*. Far from being a mere restatement of *Northern Pipeline* or *Granfinanciera*, however, "*Stern* goes further than both those cases." *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 468 (S.D.N.Y. 2011). *Northern Pipeline* held that the assignment of state-law contract claims to bankruptcy courts under the Bankruptcy Act of 1978 violated Article III of the Constitution. 458 U.S. at 87. A majority of the Court agreed that the claims at issue did not involve "public rights" that could be delegated to bankruptcy courts for resolution, but a majority was unable to agree on the confines of the public rights exception. *Id.* at 69-72. In *Granfinanciera*, the Court held that a non-creditor defending against a fraudulent transfer claim by a bankruptcy estate is entitled to a jury trial under the Seventh Amendment. 492 U.S. at 58-59, 64. The Court held that a fraudulent transfer claim was "more accurately characterized as a private rather than a public right," because such claims are "quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 55-56. *Granfinanciera* did not hold any portion of § 157 unconstitutional, or that bankruptcy courts could not adjudicate fraudulent transfer claims. Indeed, the Court

stated explicitly that it was not "express[ing] any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges." *Id.* at 64.

In *Stern*, a majority of the Court found that the state law counterclaim at issue—like the fraudulent transfer claim in *Granfinanciera*—sought to augment the estate and thus did not fall within any of the iterations of the public rights exception. *Stern*, 131 S. Ct. at 2614, 2616. Accordingly, the Court held that § 157(b)(2)(C), by authorizing bankruptcy courts to issue final judgments on such state law counterclaims, violates Article III. *Id.* at 2608, 2616, 2620. "*Stern* represents the first time a solid majority of the Supreme Court has applied the categorical, historical approach to limit the final adjudicative authority of the Bankruptcy Court following the 1984 Act." *Dev. Specialists*, 462 B.R. at 468.

Indeed, this Court acknowledged in *Stern* that its decision was a departure from certain assumptions in prior decisions: "In past cases, we have suggested that a proceeding's 'core' status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment in the proceeding." 131 S. Ct. at 2604 (citing *Granfinanciera*, 492 U.S. at 50 (explaining that a bankruptcy court may adjudicate "core" proceedings and issue final judgments if the district court has referred the matter to it)). Generally, lower courts and litigants had adopted the same assumption. *See Penson Fin. Servs. v. O'Connell (In re Arbco Capital Mgmt.)*, 479 B.R. 254, 260 (S.D.N.Y. 2012) ("[P]rior to *Stern*, it was widely understood that, pursuant to the 1984 Act, the Bankruptcy Court had the authority to finally resolve core matters."); *Dev. Specialists*, 462 B.R. at 466 ("Before *Stern*, courts . . . were accustomed

to resolving whether the Bankruptcy Court could finally adjudicate a given claim by asking whether or not it could be considered 'core' under 28 U.S.C. § 157."). *Stern* upended the widespread belief that Congress had lawfully granted authority to bankruptcy courts to issue final judgments on core claims in § 157(b)(1) and (2).

III. Litigants in Pending Cases Should Be Allowed to Argue that a Bankruptcy Court Lacked Authority to Issue a Final Judgment Based on *Stern*

Prior to this Court's decision in *Stern*, defendants could not have known that they had the right to contest the bankruptcy court's adjudicative power on certain claims—because it was *Stern* itself that provided defendants "with a legal basis to contest the Bankruptcy Court's adjudicative power that they did not have before." *Dev. Specialists*, 462 B.R. at 472 (noting that a "waiver of important rights should only be found where it is fully knowing").[4] As discussed in Part I above, principles of

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4. *See also Messer v. Bentley Manhattan Inc. (In re Madison Bentley Assocs., LLC)*, 474 B.R. 430, 440 (S.D.N.Y. 2012) (holding that defendants' conduct did "not warrant the waiver of important rights given the emergence of important new precedent" where defendants filed a motion to withdraw the reference eight months after *Stern*); *Wolf v. Nayna Networks, Inc. (In re Prof'l Satellite and Commc'n, LLC)*, No. 12cv70 L(MDD), 2012 WL 6012829, at *2 (S.D. Cal. Dec. 3, 2012) (finding motion to withdraw reference timely "[g]iven the timing of the *Stern* decision"); *Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)*, No. 11-2785(CM), 2011 WL 5593147, at *12 (S.D.N.Y. Sept. 23, 2011) ("[U]ntil *Stern* strongly embraced the approach of the *Marathon* plurality, it is doubtful that the [defendant] knew or could have known that it had a right to Article III adjudication that it was waiving."); *Meoli v. Huntington Nat'l Bank (In re*

waiver, fairness, and common sense dictate that a litigant in a pending case who, before *Stern*, did not object to the bankruptcy court's authority to issue a final judgment on a "core" claim—as the language of 28 U.S.C. § 157 clearly provides—should be allowed to contest the bankruptcy court's authority following *Stern*.

According to the Ninth Circuit, EBIA should have foreseen the Court's decision in *Stern*, and contested the bankruptcy court's constitutional authority to adjudicate the claims, based on the Court's prior precedent. *Bellingham*, Pet. App. 32a. But as discussed, litigants were not on notice based on *Granfinanciera* and the Court's other decisions that aspects of § 157(b) were unconstitutional. *See supra* Part II; *see also Teleservices Grp.*, 456 B.R. at 339 n.66 (rejecting argument that defendant should have been aware of the constitutional deficiencies of § 157 based on *Granfinanciera* and *Northern Pipeline*). The Ninth Circuit, like most courts, assumed the constitutionality of § 157(b)(2) long after *Granfinanciera*. *See, e.g., Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 786-88 (9th Cir. 2007) (noting *Granfinanciera*'s "exclusive holding," and stating that requiring immediate transfer based on the right to a jury trial would subvert § 157, which allows bankruptcy courts to "hear" Title 11 actions and enter orders in most cases). Notably, in litigating *Stern* before the Ninth Circuit and this Court, respondent Pierce Marshall did not point to a single case from the Ninth Circuit or any other jurisdiction holding

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Teleservices Grp., Inc.), 456 B.R. 318, 339 (Bankr. W.D. Mich. 2011) (stating that, prior to the issuance of *Stern*, defendant did not make a knowing waiver of its right to have an Article III judge issue a final judgment on fraudulent transfer claims).

that bankruptcy courts lack the constitutional authority to decide core matters.[5]

The Ninth Circuit's own decision in *Marshall v. Stern* certainly was not a meaningful precursor to this Court's holding in *Stern*. *See Bellingham*, Pet. App. 32a (conceding that the Ninth Circuit "reached a different set of conclusions than the Supreme Court ultimately did" in *Stern*). The Ninth Circuit held that the bankruptcy court could not issue a final judgment on the estate's counterclaim because it was *not* a core proceeding under § 157. *See Marshall*, 600 F.3d at 1060. The Ninth Circuit made no comparison to the fraudulent transfer claims at issue in *Granfinanciera*, as did the *Stern* majority in explaining that both types of claims were private rights.[6] *Stern*, 131 S. Ct. at 2614, 2616, 2618. Thus, the Ninth Circuit's decision could not have put litigants on notice that

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5. Indeed, the Ninth Circuit affirmatively held that bankruptcy courts *did* have the constitutional authority to adjudicate fraudulent transfer claims, such as those at issue in *Bellingham*. *See Duck v. Munn (In re Mankin)*, 823 F.2d 1296, 1300 (9th Cir. 1987) (holding that a fraudulent transfer suit brought pursuant to 11 U.S.C. § 544 and California law was a core proceeding and the bankruptcy court's adjudication of the matter did not violate Article IIIa); *see also id.* at 1299 (noting as a preliminary matter that fraudulent transfer claims under § 548 are "unquestionably" core matters under § 157(b)(2)(H)). *Mankin* remained the law in the Ninth Circuit until the *Bellingham* court explicitly overruled it. *Bellingham*, Pet. App. 15a.

6. The Ninth Circuit cited *Granfinanciera* in a different context and without any discussion of the case. *See Marshall*, 600 F.3d at 1053 n.23, 1057. The concurring opinion cited *Granfinanciera* as further support for the Ninth Circuit's holding that the counterclaim was not "core," and the bankruptcy court lacked jurisdiction over it. *See id.* at 1068 nn.16 & 18.

bankruptcy courts do not have constitutional authority to issue final judgments on certain core claims, particularly fraudulent transfer claims.

In contrast to the Ninth Circuit's decision in *Stern*, this Court's decision did reference *Granfinanciera* and other earlier decisions, but reliance on prior precedent—an inherent feature of judicial decision-making—hardly means the outcome was so inevitable that any prudent litigant should have anticipated it. This Court rejected a similar approach to waiver in *Curtis Publishing*. At issue in that case was whether the defendant had waived certain constitutional defenses to libel claims based on this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which the Court issued soon after the jury returned a verdict against the defendant in *Curtis Publishing*. *See* 388 U.S. at 138-39. The appellate court held that the defendant waived any right to challenge the verdict on *Sullivan* grounds because "the general state of the law at the time of [the] trial was such that [appellant] should . . . have seen 'the handwriting on the wall.'" *Id.* at 143 (citing 351 F.2d 702, 734 (5th Cir. 1965)). This Court disagreed, stating that although *Sullivan* "did draw upon earlier precedents," there was strong precedent indicating that libel actions were not subject to constitutional challenge.[7] *Id.* at 143-44. The Court held that it was the

7. The Court stated further that "[g]iven the state of the law prior to our decision in [*Sullivan*], we do not think it unreasonable for a lawyer trying a case of this kind . . . to have looked solely to the defenses provided by state libel law." 388 U.S. at 144. Moreover, the Court rejected the notion that its grant of certiorari in *Sullivan* should have signaled a different conclusion, or that defendants' counsel, who were involved in *Sullivan*, should have been alerted to the constitutional issues. *Id.*

"eventual resolution of [*Sullivan*], rather than its facts and the arguments presented by counsel, which brought out the constitutional question," and thus the Court "would not hold that [the defendant] waived 'a known right' before it was aware of the [*Sullivan*] decision." *Id.* at 145.

As with the *Sullivan* defense in *Curtis Publishing*, bankruptcy litigants should be allowed to assert a *Stern* objection to the bankruptcy court's exercise of authority to decide a particular claim, even if they did not assert that objection before *Stern* was decided. What should matter is the litigant's conduct *after Stern*, not before. *See Dev. Specialists*, 462 B.R. at 469 (stating that the timeliness of a motion to withdraw the reference "should be evaluated by looking to how promptly the [defendants] moved for withdrawal following *Stern*"). If the litigant asserted an objection based on *Stern* within a reasonable time period, the objection should be heard. By contrast, if the litigant waits to let the case develop and then springs the *Stern* objection only after things go south, then the *Stern* objection might be deemed waived. *See Bank of Neb. v. Rose (In re Rose)*, 483 B.R. 540, 545 (B.A.P. 8th Cir. 2012) (debtor consented to bankruptcy court's final judgment on state law counterclaims where debtor failed to object at the trial or in the post-trial brief filed nearly one year after *Stern* was issued and objected only after receiving an adverse judgment).[8] But where a litigant asserts its

8. *See also Gibson v. Tucker (In re G&S Livestock Co.)*, 478 B.R. 906, 917 (S.D. Ind. 2012) (defendants consented to bankruptcy court adjudication of fraudulent transfer claims where they stipulated to the court's authority under § 157 in their post-trial brief filed four months after *Stern* was issued and objected to the court's authority only after receiving an adverse judgment); *Dev. Specialists*, 462 B.R. at 472 (distinguishing litigants that move to

(new) rights within a reasonable period of time, there is no concern with sandbagging, and no waiver of a known right.[9]

So it is here. Under Ninth Circuit precedent controlling at the time, EBIA did not have a valid constitutional objection to the bankruptcy court's adjudication of the claims against it. *Stern* gave EBIA the objection it did not previously have, and EBIA thereafter asserted it. EBIA did not waive the objection by failing to assert it earlier, when it did not yet exist.

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withdraw the reference after an adverse ruling from defendants, who moved to withdraw shortly after the *Stern* decision was issued, making "sandbagging" concerns "considerably less acute").

9. The *Stern* decision discusses "sandbagging" in response to the statutory argument that the bankruptcy court lacked jurisdiction to enter final judgment on a defamation claim against the bankruptcy estate under § 157(b)(5), which provides for trial of certain claims in the district court. 131 S. Ct. at 2607-08. The *Stern* Court's comments about sandbagging did not relate to the argument that the bankruptcy court lacked constitutional authority to enter final judgment on the bankruptcy estate's counterclaim. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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September 16, 2013

APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

The *amici curiae* consist of the following entities:

- Atascosa Investments, LLC;
- Aurum CLO 2002-1 Ltd.;
- Bank of America, N.A.;
- Burnet Partners, LLC;
- Deutsche Bank Trust Company Americas;
- Flagship CLO III;
- Flagship CLO IV;
- Flagship CLO V;
- Gleneagles CLO Ltd.;
- Goldman Sachs Credit Partners, L.P.;
- Grand Central Asset Trust, HLD Series;
- Grand Central Asset Trust, SOH Series;
- Hartford Mutual Funds, Inc., on behalf of The Hartford Floating Rate Fund by Hartford Investment Management Company, their Sub-Advisor;
- Highland CDO Opportunity Fund, Ltd.;
- Highland Credit Opportunities CDO Ltd.;
- Highland Floating Rate Advantage Fund;
- Highland Floating Rate LLC;
- Highland Legacy Limited;
- Highland Loan Funding VII, LLC;
- Highland Offshore Partners, L.P.;
- Jasper CLO, Ltd.;

Appendix

- LL Blue Marlin Funding LLC;
- Liberty CLO, Ltd.;
- Merrill Lynch Credit Products LLC;
- Ocean Bank;
- Rockwall CDO, Ltd.;
- Silver Oak Capital LLC;
- Stedman CBNA Loan Funding LLC;
- The Foothills Group, Inc.;
- Van Kampen Dynamic Credit Opportunities Fund;
- Van Kampen Senior Income Trust;
- Van Kampen Senior Loan Fund; and
- Wells Fargo Bank, N.A.

AMICUS CURIAE BRIEF

No. 12-1200

Supreme Court, U.S.
NOV 15 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA IN SUPPORT OF RESPONDENT, PETER H. ARKINSON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. A Defendant May Consent (Expressly or Impliedly) to a Bankruptcy Judge Determining a *Stern* Proceeding. 3

A. The Current Bankruptcy System Reserves the Essential Attributes of Judicial Power in Article III Courts. 5

B. The Origins and Importance of the Rights to be Adjudicated. 8

C. The concerns that drove Congress to depart from the requirements of Article III. 10

D. The Ninth Circuit Correctly Applied This Court's Holdings And Concluded That The Right To Adjudication By An Article III Court Can Be Waived. 11

Table of Contents

Page

II. Bankruptcy courts may hear *Stern* proceedings and propose reports and recommendations. 14

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Page

Cases

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 16

Champlin Refining Co. v. Corporation Com'n of State of Okl.,
286 U.S. 234 (1932) 14

Commodity Futures Trading Com'n v. Schor,
478 U.S. 833 (1986) . . . . . *passim*

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 12

In re Bankruptcy Proceedings,
Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012) . . . 15

In re Bellingham Ins. Agency, Inc.,
702 F.3d 553 (9th Cir. 2012). 9, 12

In re British Am. Ins. Co. Ltd.,
488 B.R. 205 (Bankr. S.D. Fla. 2013) 15

In re Frazin,
F.3d -, fn. 3, No. 11-10403, 2013 WL 5495920
(5th Cir. Oct. 1, 2013) 12

In re Oldco M Corp.,
484 B.R. 598 (Bankr. S.D.N.Y. 2012) 13

Cited Authorities

Page

In re Parco Merged Media Corp.,
489 B.R. 323 (D. Me. 2013) 15

Katchen v. Landy,
382 U.S. 323 (1966).....9

Kirschner v. Agoglia,
476 B.R. 75 (S.D.N.Y. 2012).....15

MacDonald v. Plymouth County Trust Co.,
286 U.S. 263 (1932).....9, 13

Murray's Lessee v. Hoboken Land Improvement Co.,
59 U.S. 272 (1855).....13

Northern Pipeline Const. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982).....5, 10

Pacor, Inc. v. Higgins (In re Pacor),
743 F.2d 984 (3d Cir. 1984) 16

Peterson v. Somers Dublin Ltd.,
729 F.3d 741 (7th Cir. 2013).....13

Roell v. Withrow,
538 U.S. 580 (2003) 12, 13

Stern v. Marshall,
131 S. Ct. 2594 (2011)..... *passim*

Cited Authorities

Page

Sturges v. Crowninshield,
17 U.S. 122 (1819) 16

United States v. Olano,
507 U.S. 725 (1993) 5

Waldman v. Stone,
698 F.3d 910 (6th Cir. 2012), *cert. denied*,
133 S. Ct. 1604 (2013) 12

Wellness Intern. Network, Ltd. v. Sharif,
727 F.3d 751 (7th Cir. 2013) 12, 13

Yakus v. United States,
321 U.S. 414 (1944) 5

Statutes and Other Authorities

11 U.S.C. § 157 4

11 U.S.C. § 548(A)(1)(A) 11

28 U.S.C. § 157 . . . . . 2, 6, 10, 15

28 U.S.C. § 157(b) 6

28 U.S.C. § 157(b)(1) 6

28 U.S.C. § 157(b)(2) 2, 6, 14

28 U.S.C. § 157(b)(3) 7

Cited Authorities

Page

28 U.S.C. § 157(c)(1) 2, 6, 7, 14

28 U.S.C. § 157(d) 7

28 U.S.C. § 727(a)(2) 11

28 U.S.C. § 1334 10

28 U.S.C. § 1334(b) 6

28 U.S.C. § 1334(c) 7

Supreme Court Rule 37.3 1

A. Paskay, *Creditor's Rights* (Vandeplas Publishing 2006) 8

The Federalist No. 42 (C. Rossiter ed. 1961) 11

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Commercial Law League of America (the "CLLA") is a professional organization of more than 3,000 collection, creditors' rights, and bankruptcy professionals. Established in 1895, the core mission of the CLLA is "to be the leader in providing legal, educational and professional services to the business and credit communities." Article I of the CLLA constitution states that its "objects shall be: to promote uniformity of legislation in matters affecting commercial law; to elevate the standards and improve the practice of commercial law...."

Consistent with those core beliefs and goals, the CLLA submits this brief in support of the position taken by the respondent.

SUMMARY OF ARGUMENT

The petition presents two questions for review: first, whether an Article I bankruptcy court can finally determine a proceeding that is constitutionally reserved for an Article III court *if the parties consent (expressly or*

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1. On August 27, 2013, in accordance with Supreme Court Rule 37.3, the parties separately filed their consent to the filing of *amicus curiae* brief with the Clerk of Court. Attorneys authoring this brief on behalf of the CLLA include Jeffrey T. Kuntz and Michael D. Lessne. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

implicitly by waiver), and second, whether a bankruptcy court that does not have the constitutional authority to decide the proceeding can instead propose its findings and conclusions to the Article III court in the absence of express statutory authority to do so. These questions arise because Congress included as examples of "core" proceedings in 28 U.S.C. § 157(b)(2) certain proceedings—*Stern*[2] proceedings—that empower bankruptcy courts to exercise the judicial power of the United States where the Constitution does not permit the exercise by non-Article III judges.

The CLLA takes the following positions regarding the two questions before the Court:

(1) A defendant who fails to object to a final determination by a bankruptcy judge in a bankruptcy proceeding prior to the entry of judgment has waived the right to do so even if the judge decided an Article III matter. This is because the procedures of 28 U.S.C. § 157, as limited by *Stern*, afford such a defendant the right to an Article III judge unless the matter before the bankruptcy court is constitutionally core to the bankruptcy process.

(2) *Stern* proceedings are non-"core" proceedings in which bankruptcy judges may enter final judgments where the parties either expressly or impliedly consent. Since bankruptcy judges lack constitutional authority to enter final judgments in *Stern* proceedings, the subsections of 28 U.S.C. § 157(b)(2) that include *Stern* proceedings are void. As a result, *Stern* proceedings fall within the scope of 28 U.S.C. § 157(c)(1). It would be impractical if

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2. *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

bankruptcy judges could hear "related to" proceedings that are more attenuated than *Stern* proceedings simply because *Stern* proceedings were impermissibly classified as "core" within the Bankruptcy Code.

ARGUMENT

I. A Defendant May Consent (Expressly or Impliedly) to a Bankruptcy Judge Determining a *Stern* Proceeding.

Where a statute authorizes a non-Article III judge to enter a final judgment on an Article III matter, the right to adjudication by an Article III judge is a personal right subject to waiver so long as the law (the congressional scheme) does not violate the separation of powers. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850-851 (1986) (holding that disgruntled customers suing professional commodities broker for violations of the Commodity Exchange Act waived their rights to have state law counterclaims determined by Article III courts or state courts by not objecting until after final disposition).

To determine whether there is a structural problem with the law that cannot be cured by consent, the Court examines "the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." *Id.* at 851. The Court has taken a functional approach to answer this esoteric inquiry, "declining to adopt formalistic and unbending rules" because such rules "might unduly constrict Congress' ability to take needed

and innovative action pursuant to its Article 1 powers." *Id.* (citations omitted). *Schor* explained:

> ...in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which 'the essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (citations omitted).

The CLLA submits that the procedures of 11 U.S.C. § 157, as limited by *Stern*, reserve the essential attributes of judicial power to the Article III courts while assuring the effective and efficient administration of our bankruptcy laws by knowledgeable and experienced bankruptcy judges. Since there is no question about the constitutional authority of bankruptcy judges to hear and decide constitutionally "core" bankruptcy proceedings and to hear all other proceedings that are "related to" bankruptcy, there is no structural infirmity with our bankruptcy system. Therefore, a defendant in a *Stern* proceeding or any other "related to" matter waives the

right to district court adjudication by not objecting to the authority of the bankruptcy court prior to the entry of judgment. *See United States v. Olano*, 507 U.S. 725, 731 (1993) (stating that "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944))).

A. The Current Bankruptcy System Reserves the Essential Attributes of Judicial Power in Article III Courts.

In *Northern Pipeline*, the Court held "that a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, *absent consent of the litigants*, be heard by an 'Art. III court' if it is to be heard by any court or agency of the United States." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., succinctly reciting the position of the majority in the dissent) (emphasis supplied). It was a given that the parties could consent to adjudication by the bankruptcy court. *See also Stern*, 131 S.Ct. at 2602. The fix instituted by Congress following *Northern Pipeline*—the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act)—adopted a procedure that meaningfully changed the division of labor and stripped the bankruptcy courts of their ability to adjudicate to finality those matters that were merely "related to ... a case under title 11," absent

the consent of the parties.[3] The new procedure[4] bifurcated matters that jurisdictionally "arise under title 11 [of the Bankruptcy Code]" and "arise in ... a case under title 11"[5]—"core" proceedings—from the "related to" matters that are the stuff of Article III courts.

In defining the proceedings that are "core" proceedings, *Stern* determined that Congress exceeded its constitutional authority in at least one respect—by allowing bankruptcy courts to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. The effect of *Stern* and any other invalidation of those subsections of section 157(b)(2) that are *Stern* proceedings are that such matters are rendered "related to" proceedings. The 1984 Act's procedures combined with *Stern* constitutionally limit the bankruptcy judges to (a) making final adjudications of only quintessential bankruptcy matters (non-*Stern* "core" proceedings)[6] (28 U.S.C. § 157(b)(1)) and (b) submitting reports and recommendations to the district courts for final adjudication of Article III matters unless the parties expressly or impliedly consent (28 U.S.C. § 157(c)(1)). This ensures that bankruptcy matters are administered through a uniform bankruptcy system that does not encroach on the judicial branch.

In *Schor*, the Court distinguished the authority of the CFTC from the authority of the bankruptcy courts

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3. 28 U.S.C. § 157(c)(1).

4. 28 U.S.C. § 157.

5. 28 U.S.C. § 1334(b).

6. See the discussion in subsection 2 below regarding summary v. plenary matters.

as to the scope of the exercise of judicial power by Article I courts. 478 U.S. at 853. The distinction is no longer appropriate in light of the 1984 Act and *Stern*; bankruptcy courts, like the CFTC, deal only with a particularized area of the law for a specific and limited purpose: to administer the federal bankruptcy laws. Our federal bankruptcy system is a specific and limited regulatory scheme for the administration of our bankruptcy laws.

The right of a litigant to have an Article III determination in any other bankruptcy proceeding is preserved. The litigant has the right to object to the bankruptcy court's authority to make final determinations—by requesting the bankruptcy court determine that the matter is not a "core" proceeding pursuant to 28 U.S.C. § 157(b)(3), by seeking to have the district court withdraw the reference pursuant to 28 U.S.C. § 157(d), and by seeking abstention pursuant to 28 U.S.C. § 1334(c). Review by the district court of a non-"core," "related to" matter is *de novo* pursuant to 28 U.S.C. § 157(c)(1).

The result is that our bankruptcy system constitutionally reserves the judicial power of the United States to the district courts while providing for the uniform and efficient administration of the Bankruptcy Code. Our bankruptcy system has highly experienced and specialized judges intimately familiar with the legal issues routinely facing insolvent debtors. They are uniquely equipped to handle the scope of bankruptcy matters[7]

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7. The range of matters before the bankruptcy courts extends from high volume consumer cases (e.g., a single chapter 13 calendar call might have 50-100 hearings) to large complex business cases.

quickly and efficiently, possessing a keen understanding of how a particular dispute fits in the larger context of the entire bankruptcy estate. These attributes translate into immeasurable benefits to litigants in the form of ease of administration, diminished decision-making time, and reduced legal expense

B. The Origins and Importance of the Rights to be Adjudicated.

In *Schor*, this Court was "persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers." 478 U.S. at 854. Likewise, the congressional authorization of a bankruptcy judge's authority to decide *Stern* proceedings just like other "related to" matters is incident to the bankruptcy court's primary and unchallenged authority to adjudicate "core" proceedings that are within constitutional bounds.

Congress did not have stable bankruptcy laws until the Bankruptcy Act of 1898. The 1898 Act allowed debtors to petition for bankruptcy, and the district courts took on all cases and controversies in bankruptcy arising between the bankrupt and the creditor. The act defined "the courts of bankruptcy" to be the respective district courts and vested all jurisdiction in those courts. A. Paskay, *Creditor's Rights*, pgs. 5-6 (Vandeplas Publishing 2006). The district courts were authorized to, and generally did, appoint "referees" to adjudicate matters in bankruptcy. *Id.*

The 1898 Act limited the adjudicative authority of Article I bankruptcy referees to "summary" proceedings, as opposed to "plenary" proceedings. Bankruptcy referees were vested with authority to decide summary matters, but only an Article III judge could decide plenary suits absent consent of the parties. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 567 (9th Cir. 2012) (citing *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 267 (1932) (addressing consent)).

Summary proceedings included "controversies relating to property over which [the bankruptcy courts] have actual or constructive possession" and "matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate." *Katchen v. Landy*, 382 U.S. 323, 327 (1966) (internal citations omitted).

In *Katchen*, the Court noted that Congress "left the exact scope of summary proceedings in bankruptcy undefined." *Id.* at 328. The Court considered the structure and purpose of the Bankruptcy Act, recognizing that "a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period, and that provision for summary disposition, without regard to usual modes of trial attended by some necessary delay, is one of the means chosen by Congress to effectuate that purpose. *Id.* (internal citations omitted).

In 1978, Congress enacted the Bankruptcy Reform Act of 1978, which eliminated the referee system and established the bankruptcy system as we know it today.

The 1978 Act, however, did not limit the authority of bankruptcy judges to decide "related-to" matters.

After *Northern Pipeline*, Congress attempted to rectify the constitutional infirmities of the 1978 Act by passing the 1984 Act, attempting to heed Justice Burger's call in the dissent to "provid[e] that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court of which the bankruptcy court is an adjunct." 485 U.S. at 92. The reforms addressed, *inter alia*, mandatory and permissive abstention under 28 U.S.C. § 1334, and provided for the procedures of 28 U.S.C. § 157 to distinguish "core" proceedings over which a bankruptcy court can exercise summary jurisdiction from "related to" matters over which the bankruptcy court cannot unless the parties consent.

While Congress drew the line between "core" and "related to" in the wrong place, *Stern* and its progeny have moved it back to what is constitutionally permitted so that the bankruptcy scheme does not intrude into the province of the judiciary.

C. The concerns that drove Congress to depart from the requirements of Article III.

The importance of establishing specialized bankruptcy tribunals to effectively and efficiently administer the uniform bankruptcy laws was recognized early in this nation's history. The Framers believed that "[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, *that*

the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 271 (C. Rossiter ed. 1961) (emphasis added).

Congress has long recognized the breadth of bankruptcy, covering all matters "arising under title 11, or arising in or related to cases under title 11;" the interrelatedness of the proceedings as evidenced by the fine line between "core" and "related-to;" and the importance of having the matters decided expediently in a single forum by specialized judges.

Consider, for example, the inefficiency of a system that provides bankruptcy judges with authority to deny a debtor's discharge after determining that the bankrupt made an intentionally fraudulent transfer within a year before the petition date[8], but does not permit them to avoid the transfer itself.[9] Another example is the resolution of the claim and counterclaim in *Stern*. Having interrelated proceedings in the bankruptcy forum (even if the judge may only enter proposed findings of facts and conclusions of law in one of the proceedings) ensures the efficient and effective operation of our bankruptcy system.

D. The Ninth Circuit Correctly Applied This Court's Holdings And Concluded That The Right To Adjudication By An Article III Court Can Be Waived

The decision below adheres to the goals of Congress in maintaining an efficient bankruptcy system and the

8. 28 U.S.C. § 727(a)(2).

9. 11 U.S.C. § 548(A)(1)(A).

decisions from this Court that require a watchful eye be kept on even the slightest encroachments upon the judicial powers provided by Article III. Through its decision, "[j]udicial efficiency is served; [and] the Article III right is substantially honored." *Roell v. Withrow*, 538 U.S. 580, 587 (2003).

Relying upon *Granfinanciera*[10] and *Stern*, the Ninth Circuit concluded that bankruptcy courts do not have the general authority to enter final judgments in fraudulent conveyance actions. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 565 (9th Cir. 2012). Notwithstanding that conclusion, a bankruptcy court is permitted to prepare a proposed judgment for the district court. *Id.* (noting that in *Stern* the Court did not express any objection to the district court in that case treating the bankruptcy court's judgment as proposed). Furthermore, the Ninth Circuit concluded that "even if defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable." *Id.* at 566.

Admittedly, other courts of appeal have reached a contrary result. *See, Waldman v. Stone*, 698 F.3d 910, 914 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1604 (2013); *Wellness Intern. Network, Ltd. v. Sharif*, 727 F.3d 751, 771 (7th Cir. 2013); *In re Frazin*, - F.3d -, fn. 3, No. 11-10403, 2013 WL 5495920 (5th Cir. Oct. 1, 2013).

However, support for these decisions is not founded upon prior holdings of this Court. For example:

> ...in support of the discussion about the structural component of Article III, *Waldman*

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10. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

> emphasizes only the importance of the structural component of Article III (*see Waldman*, 698 F.3d at 917–18), but it fails to address the critical issue, derived from *Murray's Lessee*[11], *Schor* and *Stern*, that the structural component of Article III prevents *Congress* from removing cases from Article III judicial cognizance, something that has not occurred here.

In re Oldco M Corp., 484 B.R. 598, 613 (Bankr. S.D.N.Y. 2012).

In fact, with regard to *Sharif*, the Seventh Circuit itself has acknowledged its opinion has limitations. Chief Judge Easterbrook noted that the issue in *Sharif* "was forfeiture rather than waiver" and that the *Sharif* court had not discussed the impact of other decisions from the Seventh Circuit "which hold that consent on the record authorizes decision by an untenured magistrate judge, even though the parties' failure to object does not." *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013).

This Court's precedent supports the Ninth Circuit's conclusion that the right to a hearing in an Article III court is a waivable right. See, e.g., *MacDonald*, 286 U.S. at 267 (holding that the benefit of trial of a "plenary suit" in an Article III court oculd be waived by the consent of the parties); *Schor*, 478 U.S. at 848-849. Recently, the Court held that consent to the entry of judgment by a magistrate judge could be given by conduct. *Roell*, 538 U.S. at 586-587.

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11. *Murray's Lessee v. Hoboken Land Improvement Co.*, 59 U.S. 272 (1855).

The same principles that led the Court to conclude consent is permissible to allow adjudication by a non-Article III court apply in this instance. Allowing the entry of judgment by a bankruptcy court when a party has consented expressly or by waiver protects the powers provided by Article III without even a "slight encroachment."

II. Bankruptcy courts may hear *Stern* proceedings and propose reports and recommendations.

Stern matters are not "core" proceedings. Any subsections of section 157(b)(2) that are unconstitutional because they require the exercise of the judicial power of the United States are void and do not affect the remainder of the statute. *See, e.g., Champlin Refining Co. v. Corporation Com'n of State of Okl.*, 286 U.S. 234-35 (1932) (explaining that "[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

The result is that *Stern* proceedings included within subsection 157(b)(2) are void so they fall neatly within the confines of section 157(c)(1). Each *Stern* proceeding is therefore "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11" for which a bankruptcy judge may hear and submit to the district court proposed findings of fact and conclusions of law.

This Court in *Stern* implicitly accepted this principal when it recounted the district court's treatment of the bankruptcy court's judgment as proposed. *Stern*, 131 S.Ct. at 2602. Judicial districts across the country have accepted the principal by amending their orders of reference to the bankruptcy courts to provide that bankruptcy courts can hear *Stern* proceedings and submit proposed findings of fact and conclusions of law to the district court. *See, e.g., In re Bankruptcy Proceedings*, Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). Likewise, courts across the country have determined that bankruptcy courts may propose reports and recommendations on *Stern* matters. *See, e.g., In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 220-221 (Bankr. S.D. Fla. 2013); *In re Parco Merged Media Corp.*, 489 B.R. 323, 325 (D. Me. 2013); *Kirschner v. Agoglia*, 476 B.R. 75, 82 (S.D.N.Y. 2012).

While it is not the Court's role to write the law, it is certainly the Court's role to interpret it, and be guided by Congressional intent in doing so. In interpreting the 1984 Act, the Court is guided by Congress' intent, which was plainly for bankruptcy judges to enter final judgments in *Stern* proceedings. As a result of that authority being unconstitutional, the petitioner has pointed to an apparent statutory "gap" in section 157. The CLLA submits that even if such a gap does exist, it is not the result of a lack of intent on Congress' part, but rather a failure to draw the "core"/non-"core" line in the right place. When viewed in the context of the whole statute and Congress' clear intent to allow bankruptcy judges to decide what it deemed core bankruptcy matters, Congress clearly intended that at a minimum that the bankruptcy courts would be vested with the ability to propose findings of fact and conclusions of law.

To the extent that there is any doubt about the statutory basis for bankruptcy judges to submit reports and recommendations in *Stern* proceedings, it is enough for the CLLA to point to Chief Justice Marshall on the absurdity doctrine:

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Sturges v. Crowninshield, 17 U.S. 122 (1819). Through the 1984 Act, Congress gave authority to determine *Stern* proceedings. That the authority was unconstitutional does not in any way nullify congressional intent that bankruptcy judges hear such proceedings. Let there be no doubt about the view of the members of the CLLA: it is incredulous that a bankruptcy judge would be able to hear a "related to" matter (which might only *conceivably* have an effect on the bankruptcy estate,[12]) but that the judge would not be able to hear a *Stern* proceeding (a matter that Congress believed should be classified as "core" which absolutely has a greater effect on the estate).

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12. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 & n. 6 (1995); *Pacor, Inc. v. Higgins (In re Pacor)*, 743 F.2d 984 (3d Cir. 1984) (the test for determining "related-to" jurisdiction is whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy).

CONCLUSION

For these reasons, the CLLA believes the opinion of the Ninth Circuit should be affirmed in all respects.

Respectfully submitted,

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EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER ARKISON, TRUSTEE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF KERR-MCGEE CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a defendant's failure to make a timely objection to a bankruptcy court's adjudication of a fraudulent-transfer claim against him extinguish a violation of Article III's vesting clause or otherwise prevent a federal court from remedying the violation?

2. If so, what form of assent is required for a defendant to waive Article III's requirement that a federal judge adjudicate a fraudulent-transfer claim?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. LITIGANT CONSENT IS IRRELEVANT TO THE CONSTITUTIONALITY OF A NON-ARTICLE III ADJUDICATION 5

A. *Schor* Misapplies Rules Of Error Preservation And Misconceives The Vesting Clause 5

1. Error preservation rules do not distinguish between personal and structural rights 6

2. *Schor*'s theory and logic are flawed 8

3. *Schor* mischaracterizes precedents ... 11

B. The Requirement Of Article III's Vesting Clause Is Unwaivable 13

C. Rejecting *Schor*'s Approach Does Not Require Overturning Holdings Of This Court 16

II. A BANKRUPTCY COURT'S ADJUDICATION OF FRAUDULENT-TRANSFER CLAIMS VIOLATES ARTICLE III EVEN UNDER *SCHOR*'S APPROACH 18

A. Bankruptcy Courts Enter Final, Binding Judgments In Fraudulent-Transfer Cases 20

B. This Case Does Not Involve An Agency Or Regulatory Scheme 21

C. Congress Encroached On The Judicial Branch By Authorizing Bankruptcy Courts To Enter Final Judgment On Fraudulent-Transfer Claims 22

III. LITIGANT CONSENT IS RELEVANT ONLY TO THE EXTENT CONGRESS HAS MADE CONSENT A FEATURE OF THE STATUTORY SCHEME 23

A. Waiver Of Article III Rights Should Not Be Inferred From Litigant Conduct Without A Statutory Consent Requirement 24

B. The Existing Laws Do Not Contain Safeguards Sufficient To Infer Consent From A Defendant's Conduct 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Aetna Ins. Co. v. *Kennedy ex rel. Bogash*,
301 U.S. 389 (1937) 26

Bond v. *United States*,
131 S. Ct. 2355 (2011) 9

Boykin v. *Alabama*,
395 U.S. 238 (1969) 25

Brady v. *United States*,
397 U.S. 742 24

Brookhart v. *Janis*,
384 U.S. 1 (1966) 24

Capron v. *Van Noorden*,
6 U.S. 126 (1804) 9

Clark v. *Martinez*,
543 U.S. 371 (2005) 10

Clinton v. *City of New York*,
524 U.S. 417 (1998) 10

Coll. Sav. Bank v. *Florida Prepaid Postsecondary Ed. Expense Bd.*
527 U.S. 666 (1999) 24

Commodity Futures Trading Comm. v. *Schor*,
478 U.S. 833 (1986) ..... passim

TABLE OF AUTHORITIES (continued)

Page

Dist. of Columbia v. *Heller*,
554 U.S. 570 (2008) 10

Edelman v. *Jordan*,
415 U.S. 651 (1974) 25

Eldred v. *Ashcroft*,
537 U.S. 186 (2003) 10

Freytag v. *C.I.R.*
501 U.S. 868 (1991) ..... passim

Fuentes v. *Shevin*,
407 U.S. 67 (1972) 24, 25

Glidden Co. v. *Zdanok*,
370 U.S. 530 (1962) 7, 8, 15

Granfinanciera, S. A. v. *Nordberg*,
492 U.S. 33 (1989) ..... passim

Hodges v. *Easton*,
106 U.S. 408 (1882) 26

Hormel v. *Helvering*,
312 U.S. 552 (1941) 6, 7

Illinois v. *Rodriguez*,
497 U.S. 177 (1990) 24

In re Bellingham Ins. Agency, Inc.,
702 F.3d 553 (CA9 2012) 2, 5

TABLE OF AUTHORITIES (continued)

Page

Katchen v. *Landy*,
382 U.S. 323 (1966) 16

Langenkamp v. *Culp*,
498 U.S. 42 (1990) 16

Marbury v. *Madison*,
1 Cranch 137 (1803) 7, 9

Miranda v. *Arizona*,
384 U.S. 436 (1966) 24, 25, 27

Murray's Lessee v. *Hoboken Land & Improvement Co.*,
59 U.S. 272 (1855) 12, 13

Nguyen v. *United States*,
539 U.S. 69 (2003) 8

N. Pipeline Co. v. *Marathon Pipe Line Co.*,
458 U.S. 50 (1982) ..... passim

Ohio Bell Tel. Co. v. *Public Util. Comm'n*,
301 U.S. 292 (1937) 24, 26

Pacemaker Diagnostic Clinic of Am., Inc. v. *Instromedix, Inc.*,
725 F.2d 537 (CA9 1984) ..... passim

Palmore v. *United States*,
411 U.S. 389 (1973) 15

TABLE OF AUTHORITIES (continued)

Page

Peretz v. *United States*,
501 U.S. 923 (1991) 17

Roell v. *Withrow*,
538 U.S. 580 (2003) ..... passim

Stern v. *Marshall*,
131 S. Ct. 2594 (2011) ..... passim

United States v. *Olano*,
507 U.S. 725 (1993) 5, 6, 7, 24

United States v. *Raddatz*,
447 U.S. 667 (1980) 17

Waldman v. *Stone*,
698 F.3d 910 (CA6 2012) 2, 5

Wellness Int'l Network, Ltd. v. *Sharif*,
2013 WL 4441926 (CA7 Aug. 21, 2013) 13

Yakus v. *United States*,
321 U.S. 414 (1944) 6

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 9

STATUTES AND RULES

9 U.S.C. § 1, *et seq.* 16

28 U.S.C. § 157(b) 14

28 U.S.C. § 157(b)(1) 2

TABLE OF AUTHORITIES (continued)

Page

28 U.S.C. § 157(b)(2)(H) 19, 23, 28

28 U.S.C. § 157(c)(2) 28

28 U.S.C. § 158(a) 14

28 U.S.C. § 636 17

28 U.S.C. § 636(c) 18

28 U.S.C. § 636(c)(1) 27

28 U.S.C. § 636(c)(3) 27

28 U.S.C. § 636(c)(2) 27

28 U.S.C. § 636(e) 18

28 U.S.C. § 1254 14

28 U.S.C. § 1291 14

Fed. R. Civ. P. 73(b)(1) 27

Fed. R. Civ. P. 73(c) 27

INTEREST OF THE AMICUS CURIAE[1]

Kerr-McGee Corporation is a defendant in one of largest adversary proceedings ever filed in bankruptcy court. A litigation trust whose beneficiaries are former alleged creditors of Tronox Incorporated, Tronox Worldwide LLC, and Tronox LLC seeks over $20 billion, on the view that Kerr-McGee's internal restructuring and spinoff of the Tronox entities years later amounted to a fraudulent transfer. The constitutional questions presented in Kerr-McGee's case are presented in this case. Kerr-McGee submits this brief to underscore the magnitude of the interests that hang on those questions and to present arguments different from the petitioner's.

SUMMARY OF ARGUMENT

Article III, Section 1 commands that "[t]he judicial Power of the United States shall be vested" in Article III courts. There are only two historical alternatives to that rule. Congress may establish legislative courts (territorial courts, military courts, and courts adjudicating "public" rights), and it may empower judicial adjuncts as long as they do not exercise the "essential attributes" of judicial power. See *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 63–64, 77 (1982) (plurality opinion).

---

[1] Pursuant to Rule 37, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the Court held that Article III's vesting clause prohibits bankruptcy courts to adjudicate state-law counterclaims "not resolved in the process of ruling on a creditor's proof of claim." *Id.* at 2620. Those state-law counterclaims are not "public" rights but are the archetypal "private" rights that cannot be removed from Article III courts. *Id.* at 2611–2615. And in deciding those counterclaims, bankruptcy courts are not judicial adjuncts because they exercise the "essential attributes" of judicial power; they enter fully enforceable final judgments subject only to appellate review by federal courts. *Id.* at 2618–2619.

Courts agree that *Stern* applies to bankruptcy courts adjudicating fraudulent-transfer claims. See, *e.g.*, *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 561–562 (CA9 2012); *Waldman* v. *Stone*, 698 F.3d 910, 921 (CA6 2012). *Stern* envisaged as much when it reaffirmed the holding of *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33 (1989), that fraudulent-transfer claims are "private" rights. See *Stern*, 131 S. Ct. at 2614. And the judicial power bankruptcy courts exercise over fraudulent-transfer claims is identical to that which *Stern* held they unconstitutionally exercised over state-law counterclaims. See 28 U.S.C. § 157(b)(1).

So it would appear straightforward that the bankruptcy court's entry of final judgment on the fraudulent-transfer claim in this case violated Article III. The rub is that the defendants (arguably) did not timely object on that ground. The question, then, is whether and how the defendants' assent matters—did they waive or forfeit the requirement of Article III's vesting clause, or is it unwaivable?

The question has not surfaced often. In *Stern*, Pierce preserved his Article III objection; he timely told the bankruptcy court that it had no constitutional authority to decide Vickie's state-law counterclaim. See 131 S. Ct. at 2601–2602. The same goes for *Northern Pipeline*; Marathon timely asserted its constitutional right in the bankruptcy court. See 458 U.S. at 56–57 (plurality op.).

The question appears to have arisen only in *Commodity Futures Trading Comm.* v. *Schor*, 478 U.S. 833 (1986). "Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court." *Id.* at 849. So before reaching the merits of the question whether the CFTC's adjudication violated the requirement of Article III's vesting clause, the Court had to decide whether the requirement is either waivable or unwaivable. In an unprecedented move, *Schor* held that it is both. Supposedly, the vesting clause has distinct "personal" and "structural" components: the former (which *Schor* linked with precedents recognizing the historical alternatives to Article III adjudication) is waivable, and the latter (a totality-of-the-circumstances test *Schor* invented) is not. See *id.* at 848–857.

If *Schor*'s reasoning is correct, the petitioner here (arguably) waived or forfeited its personal right to challenge the bankruptcy court adjudication of the fraudulent-transfer claim as falling outside the historical alternatives, leaving only the question whether the adjudication violates the vesting clause's unwaivable structural right. But *Schor*'s reasoning is flawed and should not be followed.

Schor's personal-versus-structural dichotomy is unpersuasive. It is inconsistent with constitutional

text and mischaracterizes the precedents. More importantly, the dichotomy is irrelevant. Subject to only two exceptions, litigant consent extinguishes *all* legal errors—whether personal or structural. First, because litigants cannot confer power on Article III courts, they cannot waive or forfeit constitutional or statutory limits on federal courts' subject-matter jurisdiction. And second, in a range of exceptional cases, courts ignore litigants' assent to other defects in an adjudicator's authority. Both exceptions fit this case: a bankruptcy court's entry of judgment in violation of Article III's vesting clause expands federal appellate jurisdiction and raises exceptional questions of adjudicative authority. Applying either exception to negate litigants' consent to a violation of Article III's vesting clause would not overrule any holdings of this Court.

Even accepting *Schor*'s dichotomy, the Court should conclude that a bankruptcy court's consented-to adjudication of a fraudulent-transfer claim is unconstitutional. Bankruptcy courts are not expert agencies like the CFTC. They are courts, exercising the full range of judicial power—including entry of binding final judgments. Congress did not empower them to adjudicate fraudulent-transfer claims for a benign reason, like facilitating litigants' preferences for efficient or expert adjudication. Congress mandated that bankruptcy courts adjudicate those claims *whether or not litigants consent*.

Finally, even if litigants can waive the personal aspects of Article III's vesting clause, courts should not infer waiver from conduct. Waiver cannot be inadvertent, and "whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the de-

fendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

The personal right to an Article III judge belongs to a class of trial rights that cannot be waived impliedly. That conclusion is especially true when Congress has not made consent an operative part of the statutory scheme. In other contexts, procedures are in place to assure that litigants can freely withhold consent. But Congress requires bankruptcy courts to adjudicate fraudulent-transfer claims without regard to litigants' preferences, so a court cannot reasonably infer a knowing, voluntarily, and intelligent relinquishment of a defendant's personal Article III right from the fact that he did not object.

For these reasons, the Court should reverse the decision of the Ninth Circuit.

ARGUMENT

I. Litigant Consent Is Irrelevant To The Constitutionality Of A Non-Article III Adjudication.

A. *Schor* Misapplies Rules Of Error Preservation And Misconceives The Vesting Clause.

Because the litigants in *Schor* consented to a non-Article III adjudication of a state-law claim, *Schor* has been the focus of lower-court decisions considering how consent affects the constitutionality of bankruptcy court adjudication of similar claims after *Stern*. See *Bellingham*, 702 F.3d at 567–569 & n.9; *Waldman*, 698 F.3d at 917. *Schor* reimagined the vesting clause as having two components—"personal" and "structural." Then, claiming to be faithful to the rules of error preservation, *Schor* held

that the personal right is waivable while the structural right is not. See *Schor*, 478 U.S. at 848–857.

Schor's logic is triply flawed. First, it sets out on the wrong path. The rules of error preservation do not depend on whether a right is personal or structural; every right is waivable unless it relates to federal courts' subject-matter jurisdiction or implicates an exceptional question of adjudicative authority. Second, it is wrong as a matter of theory and logic; that a constitutional provision serves personal and structural *interests* does not mean that it creates separate personal and structural *rights*. Third, it misreads the precedents as having treated the requirement of Article III's vesting clause as personal and waivable; the precedents treated it as purely structural and suggested it is unwaivable.

1. Error preservation rules do not distinguish between personal and structural rights.

As a matter of judicial discretion, trial and appellate courts refuse to consider most errors that are not contemporaneously objected to. See *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); see also *Freytag* v. *C.I.R.*, 501 U.S. 868, 894–895, 900 (1991) (Scalia, J., concurring in part, dissenting in part). A litigant that fails to make a timely objection either "waives" his right by affirmative consent or "forfeits" it by silence. *Olano*, 507 U.S. at 733. Waiver typically extinguishes an alleged violation of a right. (*E.g.*, a criminal defendant's right to trial is not violated when he knowingly and voluntarily pleads guilty.) Forfeiture does not, and courts review forfeited errors that are "plain" and that "affect substantial rights." *Id.* at 733–734.

Yet, waiver does not extinguish every error. "Whether a particular right is waivable * * * depend[s] on the particular right at stake." *Id.* at 733. Two types of rights are unwaivable, and trial and appellate courts exercise discretion to review them despite waiver or forfeiture.

First are statutory and constitutional limits on federal courts' subject-matter jurisdiction. Trial courts always must be assured of their original jurisdiction, and appellate courts always must be assured of their appellate jurisdiction. Appellate courts also always must be assured of the original jurisdiction of the trial courts they review because their appellate jurisdiction is derivative of it. See *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."). A statutory or constitutional defect in original jurisdiction "deprives not only the initial court *but also the appellate court* of its power over the case or controversy." *Freytag*, 501 U.S. at 896 (emphasis added) (Scalia, J., concurring in part, dissenting in part); see *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535 (1962) (op. of Harlan, J.) (holding that an "alleged defect of [lower court] authority" is not waivable when it "operates also as a limitation on this Court's appellate jurisdiction"). Accordingly, a statutory or constitutional limit on an adjudicator's subject-matter jurisdiction can, and must, be raised any time before the close of direct review.

Second are errors that arise in "exceptional" circumstances. *Hormel*, 312 U.S. at 557. What counts as "exceptional" depends on the nature of the error and the litigants' interests. See, *e.g.*, *Glidden*,

370 U.S. at 535–537 (op. of Harlan, J.); *Freytag*, 501 U.S. at 878–879; *Nguyen* v. *United States*, 539 U.S. 69, 78–81 & n.12 (2003). Questions of adjudicative authority are prototypically exceptional because they implicate "a strong policy concerning the proper administration of judicial business." *Glidden*, 370 U.S. at 536 (op. of Harlan, J.); see *Freytag*, 501 U.S. at 879; *Nguyen*, 539 U.S. at 78–81.

These rules of error preservation apply to *all* rights. *Schor*, however, assumes that all personal rights are waivable and that all structural rights are unwaivable. But see *Freytag*, 501 U.S. at 893–894 (Scalia, J., concurring in part, dissenting in part). Accordingly, *Schor*'s effort to characterize the requirement of Article III's vesting clause as personal, structural, or both, simply confuses the relevant question. When a litigant raises an error he did not challenge at the proper time—whether because he consented or just remained silent—the court confronted with the belated challenge asks only whether the error affects its subject-matter jurisdiction or otherwise presents an exceptional question of adjudicative authority. If the answer is "yes," the court addresses the merits as if the error were preserved.

2. *Schor*'s theory and logic are flawed.

Schor's assertion that the vesting clause of Article III creates separate personal and structural rights (with separate waiver rules) is one-of-a-kind. Consider a more pedestrian analog. Consistent with Article III, Section 2, a Massachusetts citizen cannot sue another Massachusetts citizen in federal court on a state-law claim because the case lacks minimal diversity. Even if both consent, a federal court cannot constitutionally exercise jurisdiction and must

dismiss. Before announcing that rule, this Court did not first tease out personal and/or structural components of Article III's diversity requirement—say, a personal interest in a neutral forum and a structural interest in balancing state and federal power. The Court simply called a judgment in excess of subject-matter jurisdiction "an error *of the Court*," not an error of the litigants, so even the plaintiff who invited the error by invoking the court's jurisdiction "has a right to take advantage of" it on appeal. *Capron* v. *Van Noorden*, 6 U.S. 126, 127 (1804) (emphasis added). That conclusion flows directly from the plain and uncomplicated text of Article III, Section 2: "The judicial power shall extend * * * to controversies * * * between citizens of different states." The provision may serve personal and structural *interests*, yet it establishes just one *rule*.

The vesting clause of Article III is no different. It establishes just one rule: "The judicial power of the United States, shall be vested in" Article III courts, subject only to two historical alternatives. The rule has structural and personal purposes. It is structural because it empowers the judicial branch and circumscribes its domain vis-à-vis other branches. See *N. Pipeline*, 458 U.S. at 58 (plurality op.). And it is personal because "the judicial power" is power over, and invoked by, individual persons. See *Marbury*, 1 Cranch at 170 ("The province of the Court is, solely, to decide on the rights of individuals.").

Those structural and personal purposes are intertwined. They are substantively intertwined because structure is the means by which the Constitution preserves personal liberty. See *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635

(1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty."). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

The purposes of Article III's vesting clause are textually intertwined because they spring from the single requirement of the vesting clause. Purposes may be inferred from text, but not the other way around. Whatever the purpose (or purposes) of a rule may be, the underlying text and its meaning remain the same. See *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 577–578 (2008); *Eldred* v. *Ashcroft*, 537 U.S. 186, 211–212 (2003). Cf. *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (cautioning against "the dangerous principle that judges can give the same statutory text different meanings in different cases").

Schor's analysis contradicts all those norms. *Schor* abjured constitutional text ("the resolution of claims such as Schor's cannot turn on conclusory references to the language of Article III"), as well as "formalistic and unbending rules," in favor of purpose ("constitutionality * * * must be assessed by reference to the purposes underlying the requirements of Article III"). See 478 U.S. at 847, 851. Then, *Schor* separated the vesting clause's inseparable purposes and constructed a personal right to "an impartial and independent federal adjudication" and a structural right against Congress's creation of adjudicatory schemes that "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Id.* at 848, 851.

Further proof that *Schor*'s approach is an outlier is that no factor it identified as bearing on the vest-

ing clause's structural requirement—practical effects, congressional intent, and litigant consent—adds anything meaningful to the analysis. Whether an adjudicative scheme intrudes too much on Article III courts cannot be measured without a yardstick. See *Granfinanciera*, 492 U.S. at 70 (noting that one cannot "preserve a system of separation of powers on the basis of such intuitive judgment regarding 'practical effects'") (Scalia, J., concurring). The notion that congressional intent affects structural violations transforms Article III's vesting clause into a precatory suggestion that Congress show respect to the judiciary; it should not prove hard for Congress to fill legislative history with blandishments about the judges whose power it is removing. And *Schor*'s reliance upon litigant consent on the merits of the constitutional question departs from the traditional rule that litigant assent is relevant *only* to threshold questions of error preservation. Once a court determines that a requirement is unwaivable, it proceeds to the merits as if the error had been fully preserved.

3. *Schor* mischaracterizes precedents.

Despite admitting that precedents had not dwelt upon the newfound personal aspects of Article III's vesting clause, *Schor* implausibly asserted they "intimated" that the vesting clause is "primarily personal, rather than structural." 478 U.S. at 848. In fact, structural concerns predominate in precedents.

Take *Northern Pipeline*. After relating the Framers' concern about tyrannical government, the plurality described the vesting clause as structural—"an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial

Branch." 458 U.S. at 58 (plurality op.). The plurality linked the vesting clause with Article III's life-tenure and compensation clauses, which the plurality also described as structural. See *id.* at 59 & n.10.

Schor misread *Northern Pipeline* as recognizing that litigants can waive the requirement of Article III's vesting clause. See *Schor*, 478 U.S. at 849. *Northern Pipeline* had no occasion to consider waiver or forfeiture because Marathon timely objected. See 458 U.S. at 56–57 (plurality op.). Consent came up in a footnote; the Court noted that the challenged bankruptcy scheme did not require litigant consent whereas the prior scheme did. *Id.* at 79–80 n.31. *Northern Pipeline* called that a "significant change[]," but cautioned that the prior scheme had "never been explicitly endorsed by this Court." *Ibid.*

While it does not appear that the Court had to apply error-preservation rules to Article III's vesting clause before *Schor*, precedents *Schor* overlooked imply that the requirement of the clause cannot be waived. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855), addressed the constitutionality of a Treasury auditor's adjudication that a customs collector had underpaid the government. Pursuant to a warrant issued after the auditor's judgment, a marshal sold the collector's land to the defendant. The plaintiff, claiming he acquired the land at the same time by other means, argued that the auditor's judgment (and all that followed) violated Article III's vesting clause. In the suit between the plaintiff and defendant, the Court fully considered the constitutionality of the auditor's adjudication, upholding it as a legislative court adjudicating "public" rights, even though there was no indication that the collector lodged a timely objection

to the auditor's constitutional authority. See *Granfinanciera*, 492 U.S. at 67 (Scalia, J., concurring) (noting the apparent absence of any challenge by the collector). The collector's assent had no bearing whatsoever on the constitutional question. Indeed, the Court implied that the collector's assent was immaterial, noting that, "if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, *the proceeding was void*." *Murray's Lessee*, 59 U.S. at 275 (emphasis added).

Contrary to *Schor*'s suggestion, precedents are steeped in constitutional structure and strongly suggest that the requirement of Article III's vesting clause is unwaivable.

B. The Requirement Of Article III's Vesting Clause Is Unwaivable.

Because *Schor*'s distinction between personal and structural rights is irrelevant and because *Schor* departs from text, logic, and precedent, its approach should not govern. The Court should apply the traditional framework and hold that the requirement of Article III's vesting clause is unwaivable because of its connection with federal appellate subject-matter jurisdiction and because it raises exceptional questions of adjudicative authority.

In isolation, questions about the constitutionality of adjudication by non-Article III entities might seem unrelated to the subject-matter jurisdiction of Article III courts and, thus, outside the rule that limits on federal jurisdiction are unwaivable. Lower courts have held as much in several contexts. See, *e.g.*, *Wellness Int'l Network, Ltd.* v. *Sharif*, 2013 WL 4441926, at *14 (CA7 Aug. 21, 2013); *Pacemaker Di-*

agnostic Clinic of Am., Inc. v. *Instromedix, Inc.*, 725 F.2d 537, 543–544 (CA9 1984). But in the bankruptcy context, the right to an Article III judge is unwaivable because a bankruptcy court's unconstitutional adjudication of a fraudulent-transfer claim ultimately expands federal courts' jurisdiction—specifically, their appellate jurisdiction over the bankruptcy court's judgment.

The vesting clause of Article III establishes a constitutional limit on subject-matter jurisdiction. See *N. Pipeline*, 458 U.S. at 87 n.40 (plurality op.) ("[T]he new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state law contract claim * * *."). When a bankruptcy court enters final judgment in violation of that constitutional limit, it expands the appellate jurisdiction of federal courts. After a bankruptcy court enters final judgment on a fraudulent-transfer claim pursuant to 28 U.S.C. § 157(b), a federal district court may exercise appellate jurisdiction under 28 U.S.C. § 158(a). After that, a federal court of appeals and this Court may exercise appellate jurisdiction under generally applicable appellate-jurisdiction statutes, including 28 U.S.C. § 1291 and § 1254. To exercise that appellate jurisdiction, a federal court must assess not only its own statutory and constitutional jurisdiction, but the statutory and constitutional jurisdiction of the bankruptcy court as well. If the bankruptcy court's authority to enter final judgment is constitutionally improper (because the vesting clause requires an Article III court to decide the case instead), federal appellate jurisdiction is constitutionally improper as well. See, *supra*, p.7. Even *Schor* recognized the force of this logic (as to the structural aspects of Article III's vesting clause): "the parties cannot by con-

sent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction." *Schor*, 478 U.S. at 851 (citing *United States* v. *Griffin*, 303 U.S. 226, 229 (1938)); see also *Freytag*, 501 U.S. at 897 (Scalia, J., concurring in part, dissenting in part) ("It is clear from our opinion in *Schor* that we had the analogy to Article III subject-matter jurisdiction in mind."). Accordingly, a federal court exercising appellate jurisdiction over a bankruptcy court's judgment must decide whether, consistent with Article III's vesting clause, the bankruptcy court had constitutional jurisdiction to enter the judgment—even if the bankruptcy court had statutory jurisdiction and even if the litigants timely objected.

Exceptional circumstances also warrant voiding litigants' assent to let a bankruptcy court enter final judgment on a fraudulent-transfer claim. The question whether Congress may reassign the power to enter final judgment on a fraudulent-transfer claim from an Article III judge to a bankruptcy judge implicates a "strong policy concerning the proper administration of judicial business"—perhaps the strongest such policy. *Glidden*, 370 U.S. at 536 (op. of Harlan, J.). It thus comes within the heartland of questions exceptional enough to answer despite litigants' failure to preserve them. Indeed, issues of adjudicative authority and appointments are inextricably intertwined, see *Palmore* v. *United States*, 411 U.S. 389, 405–407 (1973) (discussing *O' Donoghue* v. *United States*, 289 U.S. 516 (1933)), so the fact that the Court has found the latter exceptional is evidence the former is exceptional too.

The constitutionality of an adjudication by a federal officer therefore stands or falls on its consisten-

cy with Article III's vesting clause. Unless the officer acts as a legislative court (a territorial court, a military court, or a court adjudicating "public" rights) or as a judicial adjunct, he must be an Article III judge. Anything else is unconstitutional, so "[e]ven if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no." *Freytag*, 501 U.S. at 896 (Scalia, J., concurring in part, dissenting in part).

C. Rejecting *Schor*'s Approach Does Not Require Overturning Holdings Of This Court.

Rejecting *Schor*'s personal-versus-structural dichotomy would not disturb the Court's holdings on other non-Article III adjudicative schemes. Not even *Schor* would have to be overruled. As *Stern* read *Schor*, the CFTC proceeding was constitutional principally because the CFTC's resolution of a federal reparations claim (a "public" right, according to *Schor*) necessarily resolved state-law counterclaims presenting the same issues. See *Stern*, 131 S. Ct at 2613–2614 (citing *Schor*, 478 U.S. at 856). Because the CFTC's judgment on a reparations claim has collateral estoppel effect and can preclude relitigation of overlapping state-law claims outright, there is no violation of Article III's vesting clause if the CFTC decides all the claims at once.[2]

Arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, also would be unaffected because Article III's vesting clause applies only to *federal* officers. A private arbitrator's decision on a

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[2] *Stern* read *Katchen* v. *Landy*, 382 U.S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U.S. 42 (1990) (per curiam), the same way. See *Stern*, 131 S. Ct. at 2616–2617.

claim is no more a violation of Article III than a state-court judge's decision on the same claim. See *N. Pipeline*, 458 U.S. at 64 n.15 (plurality op.) ("[T]he principle of separation of powers is not threatened by leaving the adjudication of federal disputes to [state-court] judges"); see also *Freytag*, 501 U.S. at 911 (Scalia, J., concurring in part, dissenting in part) ("[G]iven the performance of adjudicatory functions by a federal officer, it is the identity of the officer * * * that tells us whether the judicial power is being exercised."). Arbitrators also do not enter final judgments, but like judicial adjuncts, their judgments must be enforced by courts. See *N. Pipeline*, 458 U.S. at 78–79 (plurality op.); see also *Stern*, 131 S. Ct. at 2619 (noting that bankruptcy judges are not judicial adjuncts because they enter final judgments). Litigant consent is not the reason why the FAA comports with Article III's vesting clause.

Adjudication by a magistrate judge under 28 U.S.C. § 636 is more complicated. The Court has treated magistrate judges as judicial adjuncts insofar as they render decisions that are not final. See *United States* v. *Raddatz*, 447 U.S. 667 (1980). In *Peretz* v. *United States*, 501 U.S. 923 (1991), the Court extended that logic to criminal *voir dire*. Although *Peretz* discussed litigant consent and cited *Schor* favorably, *id.* at 936, *Schor* did not factor into *Peretz*'s holding, which relied on the fact that district courts retain authority to decline to empanel a jury and to review rulings rendered during delegated *voir dire*—that is, courts retain the essential attributes of judicial power. See *id.* at 937–939; see also *id.* at 951 (Marshall, J., dissenting) (accusing the majority of being unfaithful to *Schor*).

The Court has never addressed whether magistrate judges remain judicial adjuncts when entering final judgments or contempt sanctions, which the statute expressly allows if litigants agree to let a magistrate judge preside. See 28 U.S.C. § 636(c), (e). The closest the Court has come to that constitutional question is not all that close. See *Roell* v. *Withrow*, 538 U.S. 580 (2003) (holding that implied consent suffices *under the statute* but not addressing the constitutionality of the impliedly consented-to judgment). Adjudication by a magistrate judge appears substantially similar to adjudication by a bankruptcy judge: both are federal officers exercising the full extent of federal judicial power, including entering final judgments subject only to appellate review by federal courts. Magistrate judges entering final judgment on civil claims likely are not judicial adjuncts, just as bankruptcy judges certainly are not.

That is not to say that all final judgments entered by magistrate judges are unconstitutional. In some cases, magistrate judges might be the equivalent of legislative courts adjudicating "public" rights. The important takeaway is that consent cannot extinguish a violation of Article III's vesting clause, so a federal court exercising appellate jurisdiction over a consented-to judgment of a magistrate judge cannot point to the litigants' consent as a reason either to avoid answering the constitutional question or to affirm the judgment's constitutionality.

II. A BANKRUPTCY COURT'S ADJUDICATION OF FRAUDULENT-TRANSFER CLAIMS VIOLATES ARTICLE III EVEN UNDER *SCHOR*'S APPROACH.

While *Schor*'s analysis is unsound, a bankruptcy judge's entry of judgment after a consented-to adju-

dication of a fraudulent-transfer claim is unconstitutional even under *Schor*'s approach. According to *Schor*, because error preservation is irrelevant to Article III's structural aspects, courts always must consider the extent to which an adjudicative scheme "impermissibly threatens the institutional integrity of the Judicial Branch." 478 U.S. at 851. *Schor*'s approach to structural violations requires a court to "weigh a number of factors":

> [T]he extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. *Ibid.*

In the context of the CFTC's adjudication of state-law counterclaims, *Schor* weighed those factors and concluded that the scheme was constitutional. *Id.* at 857. In this case, those factors weigh in favor of holding that the statute authorizing bankruptcy judges to adjudicate fraudulent-transfer claims, 28 U.S.C. § 157(b)(2)(H), is unconstitutional. Specifically, a bankruptcy court adjudicating a fraudulent-transfer claim (i) enters a final, binding judgment exercising broad substantive jurisdiction, (ii) outside of a regulatory scheme, (iii) where Congress has intentionally encroached on the judiciary.

Schor itself recognizes that those factors weigh in favor of holding that bankruptcy adjudications violate Article III's structural requirements. For in concluding that Congress's allocation of judicial pow-

er to the CFTC did not "impermissibly intrude on the province of the judiciary," *Schor* distinguished the CFTC's limited powers from the broad powers wielded by bankruptcy courts in the scheme that *Northern Pipeline* held unconstitutional. *Schor*, 478 U.S. at 851–853. And as *Stern* held, the problems of *Northern Pipeline* persist in a subset of "core" cases today. See *Stern*, 131 S. Ct. at 2610.

A. Bankruptcy Courts Enter Final, Binding Judgments In Fraudulent-Transfer Cases.

The reparations procedure administered by the CFTC left "far more of the 'essential attributes of judicial power' to Article III courts" than did the provisions of the bankruptcy regime held unconstitutional in *Northern Pipeline*. *Schor*, 478 U.S. at 852. A litigant could enforce a CFTC determination only in a district court, while bankruptcy judges in *Northern Pipeline* had power to issue final judgments. *Id.* at 853. The CFTC focused only on a "particularized area of law," while bankruptcy judges in *Northern Pipeline* had jurisdiction of "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." *Id.* at 852–853 (quotations omitted).

With respect to "core" matters, including fraudulent-transfer claims, bankruptcy courts still have all the "essential attributes" of judicial power they had at the time of *Northern Pipeline*. "As in *Northern Pipeline*, for example, the newly constituted bankruptcy courts are charged * * * with resolving all matters of fact and law in whatever domains of the law to which a counterclaim may lead." *Stern*, 131 S. Ct. at 2610 (citations and quotations omitted). "We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of

the *corpus juris*." *Id.* at 2615 (citations and quotations omitted). As the statute authorizes, the bankruptcy judge enters final judgment, "which [is] binding and enforceable even in the absence of an appeal." See *id.* at 2610–2611.

B. This Case Does Not Involve An Agency Or Regulatory Scheme.

Schor found it significant that the CFTC scheme was a "specific and limited federal regulatory scheme" through which "Congress intended to create an inexpensive and expeditious alternative forum" for resolving alleged violations of the CEA. *Schor*, 478 U.S. at 855. In allocating authority to the CFTC, Congress intended "only to ensure the effectiveness" of the regulatory scheme. *Id.* at 856. If the CFTC could not adjudicate state-law counterclaims, the scheme would crumble. *Ibid.* The bankruptcy scheme is different. Federal courts are available to exercise the judicial power of the United States to hear cases and controversies in which a plaintiff seeks money from a third party.

Stern involved a state-law claim for money, brought by a bankruptcy trustee. Holding that the grant of judicial power to bankruptcy courts was unconstitutional, the Court distinguished *Schor* as "a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Stern*, 131 S. Ct. at 2615 (quotations and citations omitted). Here, as in *Stern*, Article III courts are the experts at resolving common-law claims like fraudulent-transfer claims, and preserving federal courts' au-

thority over those claims will not eviscerate the crux of the bankruptcy scheme.

C. Congress Encroached On The Judicial Branch By Authorizing Bankruptcy Courts To Enter Final Judgment On Fraudulent-Transfer Claims.

Whether a particular adjudicative scheme offends Article III's structural component depends, in part, on the "concerns that drove Congress to depart from the requirements of Article III." *Schor*, 478 U.S. at 851. Significant to *Schor*'s determination that there had been no encroachment was the fact that Congress gave litigants the option to pursue claims either through the administrative procedure or in the district court. *Id.* at 855. Here, there is no option. Congress authorized bankruptcy courts to proceed despite a litigant's objection. And in many cases, the defendant is also a creditor and has no choice but to visit the bankruptcy forum to share in the estate. See *Stern*, 131 S. Ct. at 2614–2615 (noting that "consent" in the bankruptcy context is not "true consent").

"[T]he nature of the claim" also played a significant role in *Schor*'s analysis. *Schor*, 478 U.S. at 853. *Schor* explained that a "quasi-judicial method" of resolving "public" rights involves reduced "danger of encroaching on the judicial powers" than is presented when adjudication of private rights is assigned to a non-Article III forum. *Id.* at 854. The Court recognized that "[t]he risk that Congress may improperly have encroached on the federal judiciary is obviously magnified" when Congress delegates authority over "private" rights to non-Article III tribunals. *Id.* at 854. A fraudulent-transfer claim is a "private"

right whose reassignment to non-Article III tribunals magnifies congressional encroachment. Characterizing *Schor* as a case where the right to relief was "completely dependent upon adjudication of a claim created by federal law," *Stern*, 131 S. Ct. at 2614 (quotations omitted), *Stern* reaffirmed that a fraudulent-transfer claim is the prototypical example of "a suit at the common law" that must remain within Article III courts, *id.* at 2609, 2614 & n.7.

Not only did Congress reassign "private" rights to bankruptcy courts, but Congress also reassigned essential judicial power as well. Congress gave bankruptcy courts "the most prototypical exercise of judicial power: the entry of a final, binding judgment * * *." *Id.* at 2615. Because Congress had no justification for its failure to comply with Article III, a bankruptcy court's adjudication of a fraudulent-transfer claim pursuant to 28 U.S.C. § 157(b)(2)(H) is unconstitutional under *Schor*.

III. Litigant Consent Is Relevant Only To The Extent Congress Has Made Consent A Feature Of The Statutory Scheme.

Schor's holding that the personal aspects of Article III's vesting clause may be waived was tied to the statutory scheme at issue in *Schor*—one where Congress had made consent a feature and requirement of the statutory scheme. So, assuming the Court reaffirms *Schor*'s conception of Article III's vesting clause, the Court should apply established presumptions against waiver of constitutional rights. Litigants' personal rights under the vesting clause, if they are waivable, should be waived by implication only when Congress addresses the form that consent must take and delineates the circumstances in which

consent effects a waiver. Because Congress has not done so here, implied consent is insufficient.

A. Waiver Of Article III Rights Should Not Be Inferred From Litigant Conduct Without A Statutory Consent Requirement.

"[I]n the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'" *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (quoting *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)); see also *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966); *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). "This Court has always set high standards of proof for the waiver of constitutional rights." *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966).

For some rights, the Court has imposed exacting requirements for an effective waiver. See *Olano*, 507 U.S. at 733. One requirement is that waivers be knowing, voluntary, and "intelligent." See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 748 ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Constitutional rights to trial are the classic type of right that cannot be waived without informed consent. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 183 (1990). Litigants' personal rights under Article III's vesting clause are that type of right and should be treated no differently.

Implied waiver of constitutional trial rights fits uneasily with the requirement that waivers be both knowing and voluntary. See *Coll. Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (noting "how anomalous it

is to speak of the 'constructive waiver' of a constitutionally protected privilege"); *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."). Conduct alone often leaves substantial room for doubt as to whether a litigant was truly aware of her constitutional protections and genuinely meant to relinquish them. And because courts always presume that litigants have not waived rights, *Fuentes*, 407 U.S. at 94 n.31, the ambiguity that surrounds conduct-based implications makes it difficult for an implied waiver to meet constitutional minimums.

The Court's prior decisions have homed in on this difficulty. In the criminal context, the Court has held that a guilty plea, standing alone, is not sufficient to waive the constitutional rights that a plea necessarily surrenders: the rights to jury trial, to confront one's accusers, and against self-incrimination. See *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). Accordingly, the Court requires "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 243–44; see *Miranda*, 384 U.S. at 471-72 ("[W]arning [of the right to counsel] is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").

In civil cases as well, the Court declines to infer waiver from conduct that does not unequivocally evince a knowing and voluntary abandonment of constitutional rights. It has declined to infer waiver of a civil litigant's right to jury trial under the Sev-

enth Amendment, which is closely related to Article III's vesting clause. See *Granfinanciera*, 492 U.S. at 53. As early as 1882, the Court declined to find a waiver of jury rights in the absence of an express stipulation, noting that "trial by jury is a fundamental guaranty of the rights and liberties of the people," and that "every reasonable presumption should be indulged against its waiver." *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882). Similarly, in *Aetna Ins. Co.*, the Court held that litigants had not waived their jury rights by moving for a directed verdict, again emphasizing that "every reasonable presumption" must be overcome before inferring that this "fundamental" right has been abandoned. 301 U.S. at 393; cf. *Ohio Bell*, 301 U.S. at 306–307 (litigant did not waive right to evidentiary hearing by failing to oppose consolidation with a different proceeding).

Assuming the requirement of Article III's vesting clause is waivable, a statutory scheme that expressly conditions non-Article III adjudication on litigant consent might ameliorate the problems that beset waivers inferred from conduct. A statute at least can provide a litigant notice of her constitutional rights. See *Roell*, 538 U.S. at 587 n.5 (notification of the right to refuse final adjudication by a magistrate judge is a "prerequisite to any inference of consent"). And it can provide additional procedural protections to ensure that consent is truly voluntary, free from even subtle forms of coercion or duress. See *Pacemaker*, 725 F.2d at 543 ("The waiver of personal rights [to Article III adjudication] must, of course, be freely and voluntarily undertaken."). The risk that undue pressure will be exerted to induce involuntary waivers varies greatly according to context and circumstance. In some areas, it will be of little concern;

in others, it will cast a long shadow over a waiver's purportedly voluntary nature, and stringent measures will be needed to counteract it. See, *e.g.*, *Miranda*, 384 U.S. at 469 ("The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.").

Unlike the bankruptcy laws, the Federal Magistrate Act is a statutory consent scheme that incorporates these protections. The Act authorizes magistrate judges to enter final judgment in a civil matter if litigants consent. See 28 U.S.C. § 636(c)(1), (3); Fed. R. Civ. P. 73(c). There are numerous protections designed to ensure that consent is given knowingly and voluntarily. Not only does the Act require litigant consent and thus put litigants on notice, 28 U.S.C. § 636(c)(1), (3), "the clerk must give the parties written notice of their opportunity to consent," Fed. R. Civ. P. 73(b)(1). Litigants' decisions to consent (or not) are reported only to the clerk. 28 U.S.C. § 636(c)(2). And while the Act permits judges to remind litigants of the referral option, it requires them also to "advise the parties that they are free to withhold consent without adverse substantive consequences." *Ibid.* In *Roell*, the Court relied upon these safeguards as ensuring that implied consent to adjudication by a magistrate judge is knowing and voluntary. See 538 U.S. at 582. And while the question before the Court in *Roell* was purely one of statutory interpretation, the Court observed in dictum that a litigant's personal "Article III right is substantially honored" by those safeguards as well. *Id.* at 590 (citing *Schor*, 478 U.S. at 849–850).

B. The Existing Laws Do Not Contain Safeguards Sufficient To Infer Consent From A Defendant's Conduct.

The court of appeals held that EBIA, through its litigation conduct, had "impliedly consented" to final adjudication by a bankruptcy judge of the fraudulent-conveyance action brought by the trustee. The bankruptcy laws, however, do not contain any safeguards that ensure that an implied waiver of Article III rights is knowing and voluntary. Without a statutory consent requirement, EBIA's litigation conduct did not clearly and unequivocally signal consent. Applying every reasonable presumption against waiver, the Court should hold that EBIA was entitled to an Article III tribunal.

The statute governing bankruptcy court proceedings does not place litigants on notice that their consent is required for a bankruptcy judge to enter final judgment in a fraudulent-transfer action. On the contrary, the statute expressly designates actions to "recover fraudulent conveyances" as "[c]ore proceedings," 28 U.S.C. § 157(b)(2)(H), and this "'core' status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment," *Stern*, 131 S. Ct. at 2604. Only in *non-core* proceedings does the statute require "the consent of all the parties" for a final adjudication. 28 U.S.C. § 157(c)(2). Some contend that, after *Stern*, fraudulent-transfer claims should be treated as non-core claims subject to adjudication by a bankruptcy court only upon litigants' consent. But that is manifestly not what Congress intended when it wrote the statute.

Thus, assuming the vitality of *Schor*'s reasoning, a bankruptcy court's authority to finally adjudicate

fraudulent-transfer claims should not be inferred from mere conduct alone. Litigant conduct, such as appearing before a bankruptcy judge without objection or engaging in dispositive motion practice, does not unequivocally evince a knowing and voluntary waiver of Article III rights.

Because Section 157(b) misinforms litigants that their consent is not needed for final adjudication of a fraudulent-transfer claim, merely proceeding with the litigation or asserting arguments in support of a favorable decision does not indicate that Article III rights were knowingly waived. All it shows is that a litigant participated in a proceeding in accordance with the statute—a statute that, by its plain terms, violates Article III.

Nor does litigant behavior alone provide an adequate basis to conclude that a waiver is truly voluntary. Adjudication of a fraudulent-transfer claim by a bankruptcy judge is very much like adjudication of a civil trial by a magistrate judge under Section 636(c). Both involve non-Article III officers engaging in "the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court*." *Stern*, 131 S. Ct. at 2615. And both present similar concerns that withholding consent will discomfit judges on whom the litigant depends for dispassionate decisionmaking or will result in other burdens that render the litigant's choice less than voluntary. See *Pacemaker*, 725 F.2d at 543 ("If it were shown that the choice is between trial to a magistrate or the endurance of delay or other measurable hardships not clearly justified by the needs of judicial administration, we would be required to consider whether the right to an Article III forum had been voluntarily relinquished."). The Federal Magistrate Act is sensi-

tive to these concerns. The bankruptcy laws are not. They contain none of the Federal Magistrate Act's safeguards, nor any similar measures, to ensure that waiver is voluntary. Without these protections, a litigant's consent to final adjudication by a bankruptcy court should not be inferred from conduct.

If the decision below were correct, the Federal Magistrate Act could be stripped of the consent requirement in Section 636(c)(1) and all the procedural protections in Section 636(c)(2). Any civil action could presumptively be assigned to a magistrate judge for final adjudication, without informing litigants that their consent is needed, and the Article III problem would disappear if the litigants failed to object and went along with the proceedings. In *Roell*, this Court envisioned that "implied consent will be the exception, not the rule." 538 U.S. at 591 n.7. But, if the lower court's decision stands, implied consent could become the default option in fraudulent-transfer cases, with nothing in the statute to apprise litigants of their prerogative not to waive constitutional rights.

This is a far worse affront to Article III than implying waiver after a litigant is afforded the notice and other protections in the Federal Magistrate Act. If consent can cure the constitutional defect that arises when Article I judges enter final judgments in plenary civil actions, it is only because of those safeguards. See *Pacemaker*, 725 F.2d at 540 (holding that magistrates may constitutionally conduct civil trials "in light of the statutory precondition of voluntary litigant consent"). This is true *a fortiori* of *implied* consent, which is an exception to the rule that consent ordinarily must be communicated expressly. The court of appeals erred in presuming the implied-

consent exception could stand alone, without express notice of the right to withhold consent or other statutory safeguards. But where, as here, a statute directs litigants to participate in a proceeding that violates Article III, compliance with the statute does not overcome the constitutional defect.

If the Court were to hold otherwise, the result would be not only dubious waivers but also a multiplicity of ancillary and avoidable litigations over implied consent. The absence of a developed record to establish knowledge and voluntariness will leave courts with a paucity of reliable sources to resolve these litigations. And nothing will be gained by bringing on this additional uncertainty, burdens, and expenses. When a statute falsely notifies litigants that they have no Article III rights, the remedy is to fix the statute, not to force the litigants and the courts into further litigation over conjectures drawn from litigants' silence.

The waiver found by the court of appeals was a *post hoc* rationalization of an unconstitutional proceeding. It illustrates a tendency to find implied waiver in order to cure a judgment that the governing statute authorizes even though the Constitution does not. But the burden of harmonizing the statute with the requirements of Article III's vesting clause should be met by amending the statute. It should not come out of the hide of litigants whose rights are jeopardized.

The court of appeals placed the onus on EBIA to object to bankruptcy court adjudication because EBIA supposedly had ample reason to be alert to the possible Article III problem. But this turns the question from an inquiry into whether there was a knowing and voluntary relinquishment of a right, to

an inquiry into whether a litigant gamed the odds cleverly enough, and that is not the test. Even if it were, EBIA had much *better* reason to believe its consent was irrelevant to the bankruptcy court's authority, as both the statute and circuit precedent then provided. But even if EBIA knew of a possible Article III issue, there still would have been no effective waiver. EBIA was entitled to unambiguous notice of a *right* (not a mere possibility) to select an Article III tribunal. See *Roell*, 538 U.S. at 587 n.5. And the notice, if not provided by the clerk or other officer of the court, should at least have been set forth in the statute. Inferring consent based on inferred notice is a bridge too far.

The court of appeals did not address whether EBIA's purported waiver was voluntary. But, even if knowledge could be established, the voluntary nature of inferred consent ought to have been a serious concern. Exercising an unequivocal statutory right to select Article III adjudication is one thing. Moving to oust a presiding bankruptcy judge when the statute and circuit precedent say it cannot be done is quite another. The latter course of conduct presents a significant practical risk of reprisals, which necessarily overshadows the calculus whether to press for Article III adjudication. Under the circumstances, it was error for the court of appeals to assume that any implied consent was truly voluntary.

CONCLUSION

The decision of Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY

Petitioner,

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED*

Whether a bankruptcy judge may preside over and recommend proposed rulings to the district court in proceedings held to be outside of the bankruptcy court's constitutional authority to decide.

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* This *amicus* brief does not address the issue of whether a defendant in a federal fraudulent conveyance action may consent to adjudication by a bankruptcy judge, and if so, whether this consent may be waived by implication. The Respondent's and *Amici Curiae* Professors' briefs fully address this issue.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Bankruptcy Courts May Enter Proposed Findings Of Fact And Conclusions Of Law In "Core" Matters Involving Private Rights. 5

II. The Ability Of Bankruptcy Courts To Enter Proposed Findings Of Fact And Conclusions Of Law In Matters Where The Court May Not Constitutionally Enter A Final Judgment Fulfills An Important Function Of The Federal System. 10

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Agency, Inc. v. Arkinson, (In re Bellingham Insurance), 702 F.3d 553 (9th Cir. 2012) 9

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 8

Barnett v. Stern, 909 F.2d 973 (7th Cir. 1990) 9

Free Enterprise Fund v. Public Co. Accounting Oversight Board, 130 S. Ct. 3138 (2010) 8

Hills v. Gautreaux, 425 U.S. 284 (1976) 8

In re Allegheny Health, Education & Research Foundation, 383 F.3d 169, 175 (3d Cir. 2004) 9

In re Seven Fields Dev. Corp., 505 F.3d 237 (3d Cir. 2007) 9

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 5, 9, 11

Peterson v. Somers Dublin Ltd.,
No. 12-2463, --- F.3d ----, 2013 WL
4767495 (7th Cir. Sept. 6, 2013) 14

Posadas de Puerto Rico Assocs. v.
Tourism Co. of Puerto Rico,
478 U.S. 328 (1986) 9

Smith v. Wisconsin Department of
Agriculture, Trade & Consumer
Protection,
23 F.3d 1134 (7th Cir. 1994) 9

Stern v. Marshall,
131 S. Ct. 2594 (2011) ..... passim

Teton Exploration Drilling, Inc. v.
Bokum Res. Corp.,
818 F.2d 1521 (10th Cir. 1987) 9

The Emily & the Caroline,
22 U.S. 381 (1824) 8

United States v. Kelly,
314 F.3d 908 (7th Cir. 2003) 8

Wellness International Network, Ltd. v.
Sharif,
727 F.3d 751 (7th Cir. 2013) 13, 15

STATUTES

11 U.S.C. § 544 ..... 2, 11

11 U.S.C. § 548 ..... 3, 11

11 U.S.C. § 704 ..... 2, 11, 12, 13

28 U.S.C. 158 7

28 U.S.C. § 157 ..... passim

28 U.S.C. § 586(a)(1) 1

28 U.S.C. § 1334 5

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 13

Pub. L. 98-353, § 119 (July 10, 1984) 8

INTEREST OF THE *AMICUS CURIAE* [1]

The National Association of Bankruptcy Trustees ("NABT") submits its brief in support of the Respondent, and respectfully urges the Court to conclude that bankruptcy courts may continue to preside over and propose findings of fact and conclusions of law, subject to *de novo* review in the district court, in proceedings involving matters denominated as core under 28 U.S.C. § 157(b)(2), but where the bankruptcy court lacks the constitutional authority to enter a final judgment order.

NABT is a non-profit professional association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country, and to promote the effectiveness of the bankruptcy system as a whole. There are approximately 1,100 chapter 7 bankruptcy trustees currently receiving new cases, and the vast majority of them are NABT members. In forty-eight states and the federal territories, the United States Trustee has the responsibility of appointing chapter 7 panel trustees pursuant to 28 U.S.C. § 586(a)(1). The United States Trustee appoints a bankruptcy trustee in every chapter 7 case. The trustee has primary responsibility for all aspects of chapter 7 case administration.

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1 No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

Chapter 7 trustees, as the fiduciaries responsible for the administration of all chapter 7 bankruptcy cases, are charged with preserving and promoting the system's integrity by, among other things, efficiently administering their bankruptcy cases. This includes prosecuting fraudulent transfer actions under both 11 U.S.C. §§ 544 and 548. *See also* 11 U.S.C. §§ 704(a)(1), 704(a)(5).

This appeal addresses the issue of whether a bankruptcy court may submit proposed findings of fact, conclusions of law and a recommendation to the district court for *de novo* review and entry of a final order in any matter that is denominated as core under 28 U.S.C. § 157(b)(2) but where the bankruptcy court lacks the constitutional authority to enter a final judgment order.

The NABT's position is that neither this Court's recent opinion in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) nor 28 U.S.C. §157 prohibits a bankruptcy court from hearing private causes of action and submitting proposed findings of fact, conclusions of law and recommendations for *de novo* review and entry of a final order by a district court. Thus, this Court's decision on this issue is of critical importance to the NABT because it will affect the ability of trustees to efficiently and cost-effectively administer chapter 7 cases in accordance with their fiduciary mandates under the Bankruptcy Code.

SUMMARY OF THE ARGUMENT

The Court held in *Stern v. Marshall*, that "in one isolated" respect Congress exceeded the limitations of Article III of the Constitution when it established the current framework under which the bankruptcy courts decide matters. 131 S. Ct. at 2620. Under 28 U.S.C. § 157, district courts are authorized to refer "any or all" bankruptcy cases and proceedings under Title 11, and related proceedings to the bankruptcy courts under that provision; bankruptcy courts are authorized to enter final judgments in core matters and to propose findings of fact and conclusions of law to the district court for *de novo* review in matters that are not core. Section 157(b)(2) sets forth a nonexhaustive list of the matters that Congress deemed core. *Stern* held that Section 157(b)(2)(C), which authorized bankruptcy courts to enter final judgments on state law counterclaims filed by the bankruptcy estate against a creditor who had filed a claim against the estate, was unconstitutional unless the counterclaim would be resolved in the process of ruling on the creditor's claim. 131 S. Ct. at 2620. The Court described its holding as "narrow" and predicted that its ruling would not "meaningfully change[ ] the division of labor" under Section 157 between the bankruptcy courts and the district court. *Id.* at 2620.

Petitioner contends that *Stern's* "narrow" holding created a gaping statutory hole in 28 U.S.C. § 157, leaving the bankruptcy courts without any statutory authority to address matters that are denominated

as core but which are outside of the bankruptcy court's constitutional authority to decide by final order. (Pet.Br. at 46-57.) The NABT urges this Court to reject Petitioner's argument.

This Court explained that the remedy for the constitutional violation in *Stern* was "the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction. . . ." 131 S. Ct. at 2620. By "remov[ing]" the counterclaim from the bankruptcy court's core authority, the Court did not create an abyss or "Dead Zone" within Section 157 where the bankruptcy court can take no action; rather, it necessarily moved those state law counterclaims into the non-core category of proceedings, making Section 157(c)(1) and the authority of a bankruptcy judge to submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment applicable.

Affirming the bankruptcy court's power to issue proposed findings of fact and conclusions of law in all private causes of action including fraudulent transfer actions will ensure the continued extraordinary expertise of the bankruptcy courts in handling avoidance actions, which have represented a major component of bankruptcy courts' dockets for well over a hundred years.

ARGUMENT

I. Bankruptcy Courts May Enter Proposed Findings Of Fact And Conclusions Of Law In "Core" Matters Involving Private Rights.

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that "'Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2012) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985).) In response to *Northern Pipeline*, Congress enacted 28 U.S.C. §§ 1334 and 157. Section 1334 vests subject matter jurisdiction in the district courts over bankruptcy cases and adversary proceedings filed in those bankruptcy cases. Section 157 authorizes the district courts to refer bankruptcy cases and adversary proceedings to the bankruptcy courts and sets forth the authority of the bankruptcy courts to hear and determine those matters that the district courts refer to them. *See Stern*, 131 S. Ct. at 2605 (explaining the interplay between 28 U.S.C. § 1334 and § 157).

Section 157 provides that the bankruptcy courts' authority to act in referred matters depends on whether the matter is classified as "core" or not. Bankruptcy courts may enter final judgment orders in "core" matters. 28 U.S.C. § 157(b). If a matter is

not core, a bankruptcy court "shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1).

Petitioner contends that *Stern* created a statutory gap leaving the bankruptcy court without any authority to address matters that are constitutionally outside of the bankruptcy court's core authority to decide. (Pet.Br. at 46-57.) Proponents of this "Dead Zone" theory argue that there is a new genre of proceedings: those that Congress listed as core in Section 157 (b)(2), but which are outside of the bankruptcy court's constitutional authority to decide by final judgment order. The "Dead Zone" theory advances the view that for these core but unconstitutional matters, the bankruptcy courts can take no action and that such proceedings must now all be heard exclusively in the district courts.

This Court explained in *Stern* that "[w]e do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a 'narrow' one." 131 S. Ct. at 2620 (citing to the United States as *Amicus Curiae* at page 23). The United States had argued, "[t]he narrow

constitutional question presented is whether Congress, consistent with Article III, could authorize the bankruptcy judge to enter final judgment on petitioner's counterclaim (subject to appellate review as provided in 28 U.S.C. § 158) *rather than simply submitting proposed findings and conclusions to the district court.*" United States as *Amicus Curiae* at 23 (Sup. Ct. Dkt. 10-179) (Nov. 19, 2010) (emphasis added).

The Court's statement about the limited impact of its holding on the bankruptcy courts' workload, coupled with its citation to the United States' *amicus* brief suggests that the Court intended that bankruptcy courts would continue to have the authority to preside over a "counterclaim such as Vickie's"—just not authority to enter final orders. Indeed, in *Stern* the Court explained that it was "*remov[ing]* . . . counterclaims such as Vickie's from core bankruptcy jurisdiction. 131 S. Ct. at 2620 (emphasis added). Because Section 157 creates only two categories of claims—all proceedings are either core or non-core—when the Court removed Vickie's counterclaim from the bankruptcy court's core adjudicative authority, it necessarily moved that claim into the non-core category, making Section 157(c)(1) and the authority to recommend a judgment applicable.

This reading of *Stern* is consistent with well-established principles of statutory construction. First, under the severability doctrine, if part of a statute is held unconstitutional, the offending

provision is excised from the statute, leaving the remaining provisions intact. *See, e.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *United States v. Kelly*, 314 F.3d 908, 912-13 (7th Cir. 2003). Congress intended this doctrine to apply to Section 157. *See* Pub. L. 98-353, Sec. 119 (July 10, 1984). Applying this doctrine, proceedings which are delineated as "core" but which involve private rights of actions should be excised from the list of core matters delineated in Section 157(b) and deemed non-core. Thus, if a matter is core, a bankruptcy court is constitutionally permitted to enter a final order and if the bankruptcy court is not so constitutionally permitted, then the matter is deemed non-core and the bankruptcy court may recommend a ruling to the district court.

Second, it is long established that a statute should not be interpreted in a way that would defeat the purpose of the statute, if any other reasonable construction may be given to it. *See The Emily & the Caroline*, 22 U.S. 381, 388 (1824). In *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976), the Court held that "[o]nce a constitutional violation is found, a federal court is required to tailor the 'scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" Here, if Congress erred in delineating certain matters as "core", the appropriate remedy is to deem those matters non-core for purposes of Section 157.

Third, the grant of greater authority includes a grant of lesser authority. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986); *Smith v. Wis. Dept. of Agriculture, Trade & Consumer Protection*, 23 F.3d 1134, 1144 (7th Cir. 1994). The power to hear and determine a matter includes the more "modest power to submit findings of fact and recommendations of law to the district courts." *Agency, Inc. v. Arkinson, (In re Bellingham Ins.)*, 702 F.3d 553, 565 (9th Cir. 2012). That more modest power remains, even when, following *Stern*, the bankruptcy court can no longer enter a final judgment. 702 F.3d at 565-66.

Reading *Stern* to limit Section 157(b)(2)'s list of core matters to include only those over which the bankruptcy court may constitutionally enter final judgment is also consistent with pre-*Stern* case law. According to this case law, this list was limited by *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)—the Court's decision that prompted Congress to create the core and non-core distinction in the first instance. Before *Stern*, when the exercise of core authority exceeded *Northern Pipeline's* limits, the lower courts previously treated the matters as non-core, thereby allowing the bankruptcy courts to recommend rulings. *See, e.g., Barnett v. Stern*, 909 F.2d 973, 979-80 (7th Cir. 1990); *see also In re Allegheny Health, Educ. & Research Found.*, 383 F.3d 169, 175 (3d Cir. 2004); *In re Seven Fields Dev. Corp.*, 505 F.3d 237, 257 (3d Cir. 2007); *Teton Exploration Drilling, Inc. v. Bokum Res. Corp.*, 818 F.2d 1521, 1524-25 (10th Cir. 1987).

Petitioner advances the exact opposite result, thereby causing a "meaningful[] change[] [in] the division of labor" between the bankruptcy and district courts, contrary to what the Supreme Court intended in *Stern*. 131 S. Ct. at 2620.

II. The Ability Of Bankruptcy Courts To Enter Proposed Findings Of Fact And Conclusions Of Law In Matters Where The Court May Not Constitutionally Enter A Final Judgment Fulfills An Important Function Of The Federal System.

The adjudication by bankruptcy courts of fraudulent transfer claims brought under 11 U.S.C. §§ 544(b) and 548 and other avoidance actions is vital to the ability of chapter 7 trustees to effectively and efficiently perform their duties under the Bankruptcy Code. The duties of chapter 7 trustees are generally defined in 11 U.S.C. § 704. Chapter 7 trustees also are required to follow the guidelines established by the Executive Office for United States Trustees in its handbook (the "UST Handbook").[2] The UST Handbook governs a wide variety of practices and procedures pertaining to chapter 7 cases.

Currently, approximately 1100 chapter 7 trustees administer a total of over one million cases a

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[2] *See* Handbook for Chapter 7 Trustees, http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/ch7hb2012/Handbook_for_Chapter_7_Trustees.pdf. ("UST Handbook").

year.[3] Under Section 704, as elaborated upon in the UST Handbook, trustees are duty-bound to close a bankruptcy estate as expeditiously as is compatible with the best interests of the estate. *See* 11 U.S.C. § 704(a)(1). As set forth in the UST Handbook, "[d]elays in case closure diminish returns to creditors, undermine the creditors' and public's confidence in the bankruptcy system, increase the trustee's exposure to liabilities, raise the costs of administration, and, in cases involving non-dischargeable tax liabilities, expose the debtor to increased penalties and interest." UST Handbook at 6-1, 8-42. "Delays also give rise to public criticism of the bankruptcy process." *Id.* at 8-42.

The district courts' reference of title 11 matters to bankruptcy courts promotes judicial economy and the trustees' efficient administration of chapter 7 bankruptcy estates. But as this Court recognized in *Northern Pipeline*, the reference cannot be without limitation. 458 U.S. at 73-74. In response to *Northern Pipeline*, Congress created a clear distinction in the Bankruptcy Code: in matters that are not core, bankruptcy courts may only enter proposed findings of fact and conclusions of law; in matters that are core, bankruptcy courts may enter final findings of fact and conclusions of law. The outcome advanced by Petitioner, which would create a third category—core, but unconstitutional—will defeat the purposes of Congress by impeding the

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[3] *See* National Association of Bankruptcy Trustees, Bankruptcy FAQ, *available at* http://www.nabt.com/faq.cfm#Q4.

efficient administration of bankruptcy estates, engendering wasteful litigation and producing anomalous results.

First, if this Court were to adopt Petitioner's Dead Zone argument that bankruptcy courts may not issue proposed findings of fact and conclusions of law in fraudulent transfer actions, requiring trustees to litigate those proceedings in the district courts, the likely result will be significant delays. Moving fraudulent transfer and other avoidance actions to the already busy district courts would place further burdens upon the courts and trustees—already challenged with additional administrative responsibilities under the Bankruptcy Abuse and Consumer Protection Act.[4] The result would be diminished and delayed returns to creditors and exposure of the bankruptcy estate and debtors to increased costs. Such an outcome undermines the Congressional intent behind the enactment of 28 U.S.C. § 157.

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[4] Under BAPCPA, trustees are responsible for giving notices to child support claimants. 11 U.S.C. § 704(a)(10), (c) (2006). If the debtor had an employee benefits plan, the trustee now assumes the responsibilities of the plan administrator under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002. *See* 11 U.S.C. § 704(a)(11). In health care cases, trustees are responsible for maintaining and disposing of patient medical records, and must use reasonable and best efforts to transfer patients to other appropriate health care facilities. *See* 11 U.S.C. § 704(a)(12), § 351.

Second, for over 100 years bankruptcy courts have developed an expertise in handling insolvency matters and avoidance litigation. In addition, the bankruptcy courts are administrating the bankruptcy case generally, and as a result have an intimate familiarity with the underlying facts of their cases. Affirming the bankruptcy court's power to issue a report and recommendation will ensure the continued expertise of the bankruptcy courts in handling fraudulent transfer claims, which have represented an important component of bankruptcy courts' litigation dockets for well over a century. Adopting the position of the Petitioner will leave these matters in the hands of the district courts which do not have the same familiarity of the facts arising from the underlying bankruptcy case.

Third, pursuant to the outcome advanced by the Petitioner, countless core matters involving private rights that have been heard and/or ruled upon by bankruptcy courts would need to be retried before district courts, and any proceedings thus far rendered void ab initio. The Court of Appeals for the Seventh Circuit in *Wellness International Network, Ltd. v. Sharif*, 727 F.3d 751, 777 (7th Cir. 2013) held that for matters that are designated as core by Section 157(b), but for which the bankruptcy court lacks constitutional authority to enter final judgment, "the only statutorily authorized remedy would be for the district court to withdraw the reference." The Seventh Circuit premised its conclusion, in part, on its observation that "[n]o statutory provision authorizes a bankruptcy court to

propose findings of fact and conclusions of law in a core proceeding." *Id.* at 776.[5] As a result, the court determined that if the matter is core, the parties essentially will have to start over after many years of fruitless litigation.

The case of *Bank of America, N.A. v. Veluchamy*, Case No. 12-9054 (N.D.Ill.) illustrates the potential wasteful results if the approach of *Wellness* is upheld. In *Veluchamy*, the bankruptcy court had expended considerable resources in adjudicating pretrial motions, resolving evidentiary disputes and presiding over a trial, and the parties had completed post-trial briefing. On the eve of a ruling from the bankruptcy court, and despite the magistrate judge's report and recommendation that the bankruptcy court issue proposed findings of fact and conclusions of law, the district court granted the plaintiff's motion to withdraw the reference, based on the *Wellness* decision, and removed the adversary proceeding from the bankruptcy court. If the

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[5] A subsequent Seventh Circuit Court of Appeals decision, *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013), characterized *Wellness* as pertaining only to the issue of whether parties could forfeit a *Stern* objection, rather than whether parties may waive a *Stern* objection or consent to a final adjudication by a bankruptcy court. Nor did the *Wellness* decision consider prior Seventh Circuit decisions establishing "that consent on the record authorizes decision by an untenured magistrate judge." 729 F.3d at 747. As such, the *Peterson* court concluded that "the effect of an express and mutual waiver [is] open in this circuit" (*id.*) after *Wellness*.

Veluchamy district court follows the instructions contained in the *Wellness* opinion, the litigants may also have to start from scratch, multiplying the costs of litigation and creating substantial delay. *See Bank of America v. Veluchamy*, Case No. 12 CV 9054 (N.D. Ill.) October 21, 2013 Order at Docket No. 43. If the large number of avoidance actions currently pending had to start over in the district courts, the time delay, the wasted litigation expenses, and the actions that trustees would be forced to abandon because of lack of funds to start over, would be enormous.

Fourth, the "Dead Zone" theory produces anomalous results. Take for example: if a trustee sues Party A for tort, it is a non-core matter and the bankruptcy court is permitted to submit proposed findings of fact and conclusions of law to the district court pursuant to 28 U.S.C. 157(c)(1). Pursuant to the outcome advanced by the Petitioner, however, if Party A files a proof of claim in the bankruptcy case first, then the trustee's claim becomes a counterclaim, and only the district court can hear and adjudicate such tort claim.

Accordingly, the NABT urges this Court to decline the invitation to read *Stern* as eliminating the ability of bankruptcy judges to submit proposed findings of fact and conclusions of law for *de novo* review by a district court in "core" proceedings under 28 U.S.C. 157(b) involving private rights.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Bankruptcy Trustee requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

Page

Interest of the *Amicus Curiae* 1

Summary of the Argument 3

Argument 7

I. Article III does not preclude the entry of a final order in a fraudulent conveyance action by a bankruptcy court when the parties consent 7

A. Consent fundamentally affects the constitutionality of bankruptcy court adjudication 7

B. Bankruptcy court adjudication of fraudulent conveyance actions with party consent does not implicate the structural interests protected by Article III 13

II. Neither the statutory scheme nor constitutional strictures prevent a court from inferring consent from litigant conduct 27

III. Bankruptcy courts have statutory authority to submit proposed findings of fact and conclusions of law in core proceedings 31

Conclusion 37

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Hillman, 296 U.S. 222 (1935) 23

Bellingham Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency), 702 F.3d 553 (9th Cir. 2012) 28, 29

BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.), No. 12-51270, 2013 WL 5975030 (5th Cir. Nov. 11, 2013) 8

Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) 19, 20

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) .....*passim*

Crowell v. Benson, 285 U.S. 22 (1932) 16

Gov't of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989) 13

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 18, 19, 20, 22

In re Gustav Schaeter Co., 103 F.2d 237 (6th Cir. 1939) 2

In re Taylor, 655 F.3d 274 (3d Cir. 2011) 26

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 10

Katchen v. Landy, 382 U.S. 323 (1966) 11, 12, 23

Kirschner v. Agoglia, 476 B.R. 75 (S.D.N.Y. 2012) 36

Kontrick v. Ryan, 540 U.S. 443 (2004) 28

TABLE OF AUTHORITIES – Continued

Page

MacDonald v. Plymouth County Trust Co., 286 U.S. 263 (1932) 12

Matter of Maddox, 15 F.3d 1347 (5th Cir. 1994) 2

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 35

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) ... 11, 18, 32, 36

Peretz v. United States, 501 U.S. 923 (1991) 9, 12, 13

Regan v. Time, Inc., 468 U.S. 641 (1984) 34

Roell v. Withrow, 538 U.S. 580 (2003) 5, 28, 29, 39

Rothrock v. PNC Bank, N.A. (In re Parco Merged Media Corp.), 489 B.R. 323 (D. Me. 2013) 31

Sheridan v. Michels (In re Sheridan), 362 F.3d 96 (1st Cir. 2004) 33

Stern v. Marshall, 131 S. Ct. 2594 (2011) ..... *passim*

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) 11, 12, 13, 22

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 19

United States v. Raddatz, 447 U.S. 667 (1980) 9

United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) 19

Waldman v. Stone, 698 F.3d 910 (6th Cir. 2012) 8

Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013) 11

TABLE OF AUTHORITIES – Continued

Page

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 9

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 14

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. amend. VII 20

U.S. Const. art. I, § 8 21

U.S. Const. art. III ..... *passim*

7 U.S.C. § 18(f) (1976) 17

11 U.S.C. § 502(d) 20

11 U.S.C. § 541(a)(3) 19

11 U.S.C. § 548 18

11 U.S.C. § 550 ..... 18, 19

11 U.S.C. § 1302 2

28 U.S.C. § 152 9

28 U.S.C. § 157 ..... 11, 15, 35

28 U.S.C. § 157(a) 3, 9, 15, 27

28 U.S.C. § 157(b) 25, 31, 33, 35

28 U.S.C. § 157(b)(1) 34

28 U.S.C. § 157(b)(2) 5

28 U.S.C. § 157(b)(2)(H) 17, 31

28 U.S.C. § 157(c) 35

28 U.S.C. § 157(c)(1) 32, 34

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 157(c)(2) 28

28 U.S.C. § 157(d) 3, 9, 16

28 U.S.C. § 157(e) 28

28 U.S.C. § 158 ..... 16, 34

28 U.S.C. § 158(b)(6) 34

28 U.S.C. § 586 1

28 U.S.C. § 636(c)(1) 28

28 U.S.C. § 636(c)(3) 28

Fed. R. Bankr. P. 7008(a) 28

Fed. R. Bankr. P. 7012(b) 28

Fed. R. Bankr. P. 8013 16

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Br. *Amicus Curiae* of the Bus. L. Section of the Fla. Bar in Support of Neither Party 19, 21

Br. of Pet'r 29, 30

Br. of Resp't 8, 9

Charles Alan Wright et al., 13 *Federal Practice & Procedure* § 3522 (3d ed. database updated Apr. 2013) 14

H.R. Rep. No. 950595 (1977) 36

TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Margaret A. Burks, a Chapter 13 Standing Trustee for the Southern District of Ohio and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

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[1] Pursuant to Supreme Court Rule 37.2(a), the NACTT states that the parties have filed letters with the Court granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13 programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Co.*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the "Bankruptcy Code"). *Maddox*, 15 F.3d at 1355.

This case presents issues that have the potential to harm the consumer bankruptcy system broadly and the chapter 13 system in particular. The high-volume nature of consumer bankruptcy practice

makes the consumer bankruptcy system particularly susceptible to changes in the complexity of case administration. The NACTT and its members are also deeply aware of the importance of the specialized knowledge of bankruptcy and related law that bankruptcy courts provide.

SUMMARY OF THE ARGUMENT

The NACTT urges the Court to affirm the Ninth Circuit's conclusion that bankruptcy courts may adjudicate fraudulent conveyance actions with party consent. These determinations do not offend the constitutional limits on bankruptcy court authority. The Court has identified two sets of interests protected by Article III. The first is a personal interest that this Court has expressly concluded is subject to waiver. The second is a structural interest that is not implicated by bankruptcy court adjudications that occur only at the behest of Article III courts and, therefore, involve no encroachment upon the judicial power by other branches. The initial reference of cases and proceedings to bankruptcy courts occurs only at the election of the district courts, *see* 28 U.S.C. § 157(a), and the district courts retain the authority to withdraw the reference, *see* 28 U.S.C. § 157(d). Even if the Article III courts' control over the bankruptcy court adjudications did not eliminate structural concerns, the Court has recognized that party consent, though not dispositive, is nonetheless an important aspect in the analysis of the structural

interest. Consent, therefore, adds to the other aspects of the bankruptcy court system that alleviate structural concerns with allocating adjudicatory authority to bankruptcy courts. The allocation of authority to bankruptcy courts betrays no intent to emasculate Article III courts. It occurs at the complete discretion of Article III courts. It also builds on a strong historical foundation that plainly supports bankruptcy court adjudication of basic bankruptcy decisions. Bankruptcy court adjudication, with party consent, of proceedings associated with the basic bankruptcy proceedings does not diminish Article III courts because it serves the legitimate purpose of enhancing the effectiveness of the underlying bankruptcy process.

The nature of fraudulent conveyance actions also provides additional support for bankruptcy court authority over that particular set of proceedings with party consent. Because fraudulent conveyance determinations effectuate legislative decisions regarding the assets that should be distributed in accordance with the bankruptcy distribution scheme, they serve as predicates to the basic bankruptcy function of providing an equitable distribution of a debtor's estate. The close relationship – historically and functionally – between fraudulent conveyance actions and the basic bankruptcy proceedings reduces the structural implications of centralizing these proceedings in bankruptcy courts with party consent.

In determining whether a party has in fact consented to adjudication by a bankruptcy court, the NACTT submits that courts may infer consent from

litigant conduct, and that such an inference is appropriate regardless of whether the statutory scheme contains a specific consent requirement. The relevant issue, for purposes of the Article III analysis, is whether a party has in fact consented. A party's express consent assists greatly in that determination, but other evidence may also demonstrate consent. This Court's decisions strongly support the conclusion that courts need not ignore clear manifestations of consent from litigation conduct. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986); *Roell v. Withrow*, 538 U.S. 580, 590 (2003). Similarly, although the existence of consent as a limiting factor in the statutory scheme provides evidence of a party's awareness of the possibility of withholding consent, nothing prevents a court from examining other evidence to establish the same fact.

When constitutional limitations prevent bankruptcy courts from exercising the full adjudicative authority over core proceedings granted by statute, the bankruptcy courts still retain the authority to hear the proceedings and submit proposed findings of fact and conclusions of law to the district courts. The Court has clearly implied that Article III's restriction on bankruptcy court adjudicative authority is only a restriction on the power to "enter a final judgment." *See Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011). The statutory authority of bankruptcy courts, however, to "hear and determine" core proceedings and to "enter appropriate orders and judgments," 28 U.S.C. § 157(b)(2), encompasses more than just the power to

enter a final judgment. The power to "hear" a proceeding necessarily involves a power to submit proposed findings of fact and conclusions of law when the court is unable to enter a final order. Even if it did not, the residual authority a bankruptcy court retains when the Constitution requires the withdrawal of the power to enter a final order includes the authority to submit proposed findings of fact and conclusions of law.

This case presents particular concerns for consumer bankruptcy cases, such as those administered by the NACTT's member trustees. The consumer bankruptcy system is remarkably complex, yet it operates under significant resource constraints. Successful consumer bankruptcy practice involves high case volumes. In this environment, the efficiency demands are high. The cumulative effect of inefficiencies that might be minor irritants in a single case is potentially serious. It not only increases the cost of proceedings that – in most cases – already involve inadequate resources; it also affects the viability of effective representation in these proceedings. These considerations, of course, would not be sufficient to overcome a true structural constitutional deficiency in the bankruptcy system, but the considerations do underline the importance of the Court's practical approach to Article III.

ARGUMENT

I. Article III does not preclude the entry of a final order in a fraudulent conveyance action by a bankruptcy court when the parties consent

This Court has expressly held that the personal interests protected by Article III are subject to waiver, and the Court has made clear that consent is a significant factor in evaluating the structural concerns under Article III. Party consent, therefore, fundamentally affects the constitutionality of adjudication by non-Article III tribunals. The Court has clearly and properly rejected a rigid approach that would prevent any delegation of adjudicative authority to non-Article III tribunals. The bankruptcy court system under current law exemplifies the need for this practical approach. Basic bankruptcy proceedings properly reside in bankruptcy courts, and the centralization of associated proceedings in a single forum – including proceedings, such as fraudulent conveyance actions, that are closely tied to the basic bankruptcy proceedings – is important to the efficiency and effectiveness of the system.

A. Consent fundamentally affects the constitutionality of bankruptcy court adjudication

In *Commodity Futures Trading Commission v. Schor*, this Court unequivocally held that, "as a personal right, Article III's guarantee of an impartial

and independent federal adjudication is subject to waiver." 478 U.S. 833, 848 (1986). With respect to the personal interest protected by Article III, therefore, the Court has already decided that party consent removes the constitutional impediment to final decision by a non-Article III tribunal, such as a bankruptcy court. The *Schor* opinion also described the personal interests as the primary interests protected by Article III's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States. *Id.* (explaining that the guarantee "serves to protect *primarily personal*, rather than structural, interests" (emphasis added)).

The Court identified structural interests protected by Article III as well, but the bankruptcy court system does not implicate these interests. As the Respondent explains, the bankruptcy court system, like the magistrate system, exists only at the option of the judiciary. (Br. of Resp't at 36-40.) The complete control that Article III courts have over the bankruptcy court system contradicts the conclusion of the Fifth and Sixth Circuits that the system somehow diminishes the judicial branch. *See Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012); *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, No. 12-51270, 2013 WL 5975030 at *7 (5th Cir. Nov. 11, 2013). When parties have consented to bankruptcy court adjudication and eliminated concern regarding the personal rights protected by Article III, the analysis of bankruptcy court authority follows the Court's

analysis of magistrate authority in *Peretz v. United States*, 501 U.S. 923 (1991). In that case, the Court noted that "[m]agistrates are appointed and subject to removal by Article III judges." *Id.* at 937. The same is true of bankruptcy judges. *See* 28 U.S.C. § 152. The Court also noted that the "'ultimate decision' whether to invoke the magistrate's assistance is made by the district court." *Peretz*, 501 U.S. at 937 (quoting *United States v. Raddatz*, 447 U.S. 667, 683 (1980)). Again, the bankruptcy court system is virtually identical.[2] *See* 28 U.S.C. § 157(a) (providing district courts the discretion to refer proceedings to the bankruptcy courts); *see also* 28 U.S.C. § 157(d) (permitting district courts to withdraw, in whole or in part, any case or proceeding referred to the bankruptcy courts). The Respondent is also correct that the consensual referral of proceedings to bankruptcy courts does not violate the nondelegation doctrine. (Br. of Resp't at 40-42.) The historical practice of consensual referrals and the continuing ability of district courts to withdraw the reference of a proceeding distinguish this system from unconstitutional delegations of legislative power to executive agencies without any "intelligible principle" to control the delegation of power. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472

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[2] In describing the magistrate system, the Court also noted that the district court's decision to invoke the magistrate's assistance is "subject to veto by the parties." *Peretz v. United States*, 501 U.S. 923, 937 (1991). Because the bankruptcy court authority the Petitioner advocates in this case involves party consent, it is functionally the same on this point as well.

(2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Even if the framework for the bankruptcy court system did not wholly remove structural concerns, the *Schor* opinion made clear that, although "notions of consent and waiver cannot be dispositive" with respect to structural issues, *Schor*, 478 U.S. at 851, consent nevertheless affects the assessment of whether a non-Article III adjudication implicates structural interests. *See id.* at 855 ("[I]t seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."). The structural aspect of Article III is closely related to the personal aspect; the judiciary's structural role is, in large part, to protect individual liberty by providing an impartial tribunal. *See Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) ("As Hamilton put it, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton)) (internal quotation marks omitted)).

The close relationship between the structural and personal interests protected by Article III calls into question the conclusion by the Seventh Circuit that the Court, in *Stern*, has already decided that the

statutory scheme under 28 U.S.C. § 157 implicates structural concerns. *See Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 771 (7th Cir. 2013). The constitutional issue in the *Stern* case did not involve consent, so the Court had no reason to discuss the personal/structural dichotomy, and the significant overlap between the structural and personal interests prevents the Court's discussion in *Stern* from standing for anything other than a discussion of the combined interests, in the absence of consent. Indeed, the effect of consent on the analysis of structural concerns reveals an even deeper flaw in the Seventh Circuit's conclusion. The *Stern* case presented a materially different *structural* analysis because it did not involve consent.

The Court has provided other indications of the importance of consent in the Article III analysis. In the *Stern* case, the Court noted the lack of true consent as a factor distinguishing the case from *Schor*. *Stern*, 131 S. Ct. at 2614. Similarly, the Court has taken care to specify that its holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), only concerned Congress's authority to vest power in non-Article III courts "without consent of the litigants." *See, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985). In *Katchen v. Landy*, moreover, the Court noted that its holding left no need to "ascertain whether the creditor has 'consented' . . . within the meaning of s 23, sub. b" of the Bankruptcy Act, without any suggestion that a consent-based adjudication would present a

constitutional concern. 382 U.S. 323, 333 (1966). Similarly, in *MacDonald v. Plymouth County Trust Co.*, the Court raised no constitutional issues after concluding that a bankruptcy "referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit" before a district court under the Bankruptcy Act. 286 U.S. 263, 267 (1932). If that proceeding had presented a structural constitutional concern, the Court presumably would not have authorized it to go forward.

The Court has also addressed the constitutional significance of consent in other contexts. In addition to its conclusion in *Peretz* that "consent significantly changes the constitutional analysis" and that "there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent," 501 U.S. at 932, the Court also cited party consent as a factor in support of its conclusion that the arbitration scheme under the Federal Insecticide, Fungicide, and Rodenticide Act complied with Article III in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. at 591-92. The significance of consent in these cases highlights the practical importance of consent-based adjudication systems. A sweeping decision against bankruptcy court adjudication in this case would threaten federal efforts to encourage private arbitration, *see generally* Peter B. Rutledge, *Arbitration and Article III*, 61 Vand. L. Rev. 1189 (2008), and the magistrate system, a system that "in today's federal judicial system is nothing less than indispensable."

Gov't of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989), *quoted in Peretz*, 501 U.S. at 928.

B. Bankruptcy court adjudication of fraudulent conveyance actions with party consent does not implicate the structural interests protected by Article III

The Court has recognized the need for a nuanced evaluation of the structural interests protected by Article III. Noting the risk that "formalistic and unbending rules" with respect to the structural interests would pose to "Congress' ability to take needed and innovative action pursuant to its Article I powers," *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986), the Court has highlighted the importance of flexibility and pragmatism in evaluating the limits imposed by Article III. *See id.* at 847 ("[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III."); *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.").

This approach is sound. Whereas the issue of personal rights is essentially zero-sum, with an improper delegation of judicial power coming at the direct expense of individuals' rights to an Article III tribunal, the structural boundaries are not so strictly

defined. "[T]he three branches are not hermetically sealed from one another." *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011). On some matters, the branches of government have "concurrent authority," *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), and one branch's exercise of authority over these matters is not at the expense of another branch simply because the other branch might also constitutionally exercise the authority. The nature of the structural interest under Article III also distinguishes it from subject matter jurisdiction. The "harsh rule" of ignoring consent in considering subject matter jurisdiction "can be justified only because the issue concerns the fundamental constitutional question of the allocation of judicial power between the federal and state governments." Charles Alan Wright et al., 13 *Federal Practice & Procedure* § 3522 (3d ed. database updated Apr. 2013). A decision by a federal court lacking subject matter jurisdiction is, *ipso facto*, an infringement of rights reserved to the states or the people. Under the structural analysis of Article III, on the other hand, the fact that a matter implicates the powers of other branches does not necessarily mean that it implicates structural concerns.

In the *Schor* case, the Court set out a number of factors, "none of which has been deemed determinative," for evaluating whether an exercise of authority implicates structural concerns, "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal

judiciary." *Schor*, 478 U.S. at 851. The dissenting opinion in the *Stern* case found these factors favored bankruptcy court authority to issue final orders even in the counterclaims at issue in that case. *Stern*, 131 S. Ct. at 2626-29 (Breyer, J., dissenting). The majority's disagreement with that assessment, however, is not conclusive as to the issue in this case. As described in greater detail below, fraudulent conveyance actions fit in a materially different category of proceedings than do the counterclaims at issue in *Stern*. Further, as noted, party consent affects the structural analysis. The majority did not consider Pierce Marshall's filing of a proof of claim as effective consent to bankruptcy court authority over his counterclaim, and so the majority opinion did not consider the effect of consent on the *Schor* factors. *See Stern*, 131 S. Ct. at 2614-15.

The first *Schor* factor is "the extent to which the essential attributes of judicial power are reserved to Article III courts." *Schor*, 478 U.S. at 851. Bankruptcy court adjudication of fraudulent conveyance actions with party consent plainly reserves the essential attributes of judicial power to Article III courts. The entire process is at the district court's option. Initial adjudication by a bankruptcy court under 28 U.S.C. § 157 occurs only when the district court exercises the discretion granted in § 157(a) to refer a bankruptcy case or associated proceeding to the bankruptcy court. 28 U.S.C. § 157(a). Further, the district court retains the authority to "withdraw, in whole or in part, any case or proceeding" it has

referred to the bankruptcy court. 28 U.S.C. § 157(d). There is no slippery slope in this framework in terms of the structural aspect of Article III. To the extent the judiciary perceives any threat to the powers reserved to it under the Constitution, it has the power to eliminate the threat completely. Even when a district court does not withdraw a proceeding, moreover, any party may appeal a bankruptcy court decision and obtain review by an Article III court. 11 U.S.C. § 158. The review of the legal conclusions on such an appeal is *de novo*. Fed. R. Bankr. P. 8013. The review of factual determinations does involve deference to the bankruptcy court's findings, *id.*, but this aspect does not create a structural concern. *See Crowell v. Benson*, 285 U.S. 22, 51 (1932) ("[T]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."), *quoted in Stern*, 131 S. Ct. at 2627 (Breyer, J., dissenting).

The second *Schor* factor is "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts." *Schor*, 478 U.S. at 851. The Court's prior decisions leave open the question of whether the adjudication of fraudulent conveyance actions is a matter normally vested only in Article III courts. Even if these proceedings do require Article III tribunals in

some circumstances,[3] however, they exist very close to the line. Bankruptcy court adjudications of fraudulent conveyance actions clearly do not encroach broadly upon Article III courts' powers. Unlike the counterclaims at issue in *Stern*, the scope of bankruptcy courts' authority under 28 U.S.C. § 157(b)(2)(H) does not extend to any "area of the *corpus juris*." *Stern*, 131 S. Ct. at 2615. It concerns only an area closely linked to the basic bankruptcy proceedings.

Admittedly, bankruptcy court orders are enforceable without district court order, unlike the orders of the non-Article III tribunal in *Schor*. *See Schor*, 478 U.S. at 853. This component of the system, however, has minimal significance in the structural analysis. Nothing in the scheme described in *Schor* suggested that the district court would conduct any *de novo* review of the underlying reparations order of the non-Article III tribunal.[4] As a practical matter, the most important question is whether an order from a non-Article III tribunal is enforceable as a final order. Further, to the extent the enforcement component is problematic, it is readily severable in the context

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[3] The validity of bankruptcy court adjudications of fraudulent conveyance actions may depend on circumstances such as whether the fraudulent conveyance would be determined in the course of the claims-allowance process or whether the parties consent to the bankruptcy court adjudication.

[4] The statute permitted any person for whose benefit a reparations order was made to file a certified copy of the order with the district court "for enforcement of reparation award by appropriate orders." 7 U.S.C. § 18(f) (1976).

here. In fact, the Bankruptcy Code clearly separates the authority to avoid fraudulent transfers, 11 U.S.C. § 548, from the authority to order recovery of the avoided transfers in 11 U.S.C. § 550.

The third *Schor* factor requires consideration of "the origins and importance of the right to be adjudicated." *Schor*, 478 U.S. at 851. Again, fraudulent conveyance actions are not the wide-ranging rights involved in *Marathon* or *Stern*. Fraudulent conveyance actions are closely associated with – if not a part of – the basic bankruptcy matters that this Court has implied bankruptcy courts may decide. They are clearly within the specialized area of bankruptcy and insolvency law. In *Granfinanciera, S.A. v. Nordberg*, the Court did hold that fraudulent conveyance actions fall outside of the public rights exception to the Seventh Amendment right to a jury trial, in large part because the Court concluded that the actions are "quintessentially suits at common law" tried no more than occasionally in courts of equity. 492 U.S. 33, 56 (1989). But the *Schor* analysis involves a different evaluation than the "public rights" analysis. The conclusion that a proceeding involves a private right, therefore, "does not end our inquiry." *Schor*, 478 U.S. at 853.

The existence of common-law fraudulent conveyance actions does not indicate that fraudulent conveyance actions are so distinct from bankruptcy proceedings that their adjudication by a bankruptcy court, with party consent, presents a structural concern. Bankruptcy addresses a collective action

problem, in large part by providing a system designed to consider the interests of creditors collectively. Fraudulent conveyance recoveries in bankruptcy play a central role in this process. In contrast to recoveries by individual creditors outside of bankruptcy, for the benefit of the individual creditors alone, recoveries of fraudulent transfers in connection with bankruptcy cases benefit the creditors in the cases collectively. (*See* Br. *Amicus Curiae* of the Bus. L. Section of the Fla. Bar in Support of Neither Party at 4-5.) In this respect, a proceeding to avoid a fraudulent conveyance in connection with a bankruptcy case is similar to a proceeding to avoid a preferential transfer, a type of proceeding that has been "a core aspect of the administration of bankrupt estates since at least the 18th century."[5] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S.

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[5] The *Katz* decision and others also suggest some qualification to *Granfinanciera*'s characterization of recovery actions as actions to "augment the bankruptcy estate." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). As a purely definitional matter, the Court has indicated in other cases that the trustee's recovery rights represent "property of the estate" under the Code. *See, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983) (noting that "property of the estate" includes "any property made available to the estate by any other provision of the Bankruptcy Code"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) ("[T]he right to recover a postpetition transfer under § 550 . . . is 'property of the estate' (defined in § 541(a)(3))."). But the *Katz* decision also seems to go the substantive question of whether fraudulent conveyance actions stand apart from the main bankruptcy case. The *Katz* decision presents a different view of the bankruptcy case than *Granfinanciera*, implying that an action seeking the recovery of actual property transferred – even particular dollars conveyed –

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356, 372 (2006). Both types of proceedings effectuate legislative decisions about the restructuring of debtors' financial affairs and both serve as predicates to the "equitable distribution" that is one of the "[c]ritical features of every bankruptcy proceeding." *Id.* at 364-65. Both also are expressly incorporated into the claims-allowance process when a transferee has filed a proof of claim: the Code makes the recovery of any voidable preferential or fraudulent transfer a condition of the allowance of a transferee's claim. 11 U.S.C. § 502(d).

The classification of fraudulent conveyance actions as legal rather than equitable – which the Court has conceded "admits of some debate," *Granfinanciera*, 492 U.S. at 55 – is also not conclusive in the structural analysis. The law/equity divide, though central to the Seventh Amendment analysis, provides an incomplete picture, especially in the Article III structural analysis. *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 617 (1998) ("[T]he legal-equitable distinction fails . . . because it does not recognize bankruptcy as a *sui generis* creation of the legislature."). Historically, moreover, fraudulent conveyance determinations did *not* always require court action: "Under the eighteenth-century practice, the commissioners initially adjudicated whether there had been a preferential or fraudulent

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falls within the court's *in rem* jurisdiction over the estate. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 n.10 (2006).

transfer of the bankrupt's property. Such a transfer often was an act of bankruptcy that the commissioners initially determined." *Id.* (footnote omitted). Regardless of whether the historical practice is sufficient to bring fraudulent conveyance determinations into the constitutionally core matters that bankruptcy courts have the authority to adjudicate regardless of consent,[6] it surely eliminates any significant *structural* concerns with adjudication when parties do consent.

The fourth and final *Schor* factor requires consideration of "the concerns that drove Congress to

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[6] An *amicus* in this proceeding, in fact, argues that bankruptcy courts have constitutional authority to adjudicate fraudulent conveyances regardless of consent. (Br. *Amicus Curiae* of the Bus. L. Section of the Fla. Bar in Support of Neither Party.) The fact that fraudulent conveyances rest in a gray area, even in the historical record, suggests that the constitutional grant empowering Congress to "establish . . . uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, provides Congress the authority to delegate the determination of fraudulent conveyances to the bankruptcy courts. *Cf.* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 574 (1998) ("From the nature of preconstitutional bankruptcy adjudication emerges a general principle: The details of bankruptcy adjudication are a matter of legislative discretion requiring only a right of appeal to a court of law or equity."). The Court, however, need not conclude that historical practice alone permits bankruptcy courts to enter final orders in fraudulent conveyance actions in order to find that the close connection between them and other bankruptcy-related matters affects the third *Schor* factor in assessing structural concerns with bankruptcy court adjudication with party consent.

depart from the requirements of Article III." *Schor*, 478 U.S. at 851. This factor weighs strongly against any finding of structural concerns with bankruptcy court adjudication of fraudulent conveyance actions. Compelling practical considerations have motivated Congress's efforts to centralize bankruptcy-related proceedings in bankruptcy courts and conclusively demonstrate that the efforts have a "valid legislative purpose." *Thomas*, 473 U.S. at 593. The inclusion of fraudulent conveyance actions within bankruptcy courts' authority reflects "Congress' conclusion that the proper functioning of the bankruptcy system requires that expert judges handle these claims, and that the claims be given higher priority than they would receive on a crowded district court's civil jury docket." *Granfinanciera*, 492 U.S. at 93-94 (Blackmun, J., dissenting). Even more than bankruptcy court adjudication of the counterclaims at issue in *Stern*, the adjudication of fraudulent conveyance actions by bankruptcy courts "plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system." *Stern*, 131 S. Ct. at 2629 (Breyer, J., dissenting); *see also Granfinanciera*, 492 U.S. at 93-94 (Blackmun, J., dissenting) ("Although causes of action to recover fraudulent conveyances exist outside the federal bankruptcy laws, the problems created by fraudulent conveyances are of particular significance to the bankruptcy process."). Unlike the denial of bankruptcy court authority over counterclaims, moreover, the denial of authority over fraudulent conveyance actions would "meaningfully change[ ] the

division of labor in the current statute." *Stern*, 131 S. Ct. at 2620.

Also significant is the fact that bankruptcy court authority over fraudulent conveyance proceedings ultimately derives from the authority over basic bankruptcy proceedings that the Court has implied that bankruptcy courts may constitutionally exercise. *See, e.g.*, *Stern*, 131 S. Ct. at 2618 ("[T]he question is whether the action at issue stems from the bankruptcy itself. . . ."). The authority over secondary proceedings, therefore, bears some resemblance to concepts of supplemental jurisdiction. *Cf. Katchen v. Landy*, 382 U.S. 323, 335 (1966) (noting the "rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief" (quoting *Alexander v. Hillman*, 296 U.S. 222, 242 (1935)) (internal quotation marks omitted)). In both circumstances, the authority over the primary proceeding provides the foundation for the authority over the secondary proceeding. This analogy may not, by itself, validate bankruptcy court authority over all associated proceedings, but it weighs against any structural concern with that authority when parties consent.

The value of the bankruptcy court forum is more than just the value of a single forum for bankruptcy matters. The bankruptcy court system also provides a forum that is sensitive to the demands of bankruptcy cases. Bankruptcy courts are capable of the expeditious review that is often critically important in bankruptcy matters. Further, although bankruptcy

courts may not be specialized courts with respect to the type of counterclaim at issue in *Stern*, bankruptcy courts do have specialized knowledge with respect to debtor-creditor law, an area of law that extends beyond the Bankruptcy Code. For example, bankruptcy courts routinely decide issues under Article 9 of the Uniform Commercial Code in the exercise of their constitutionally core responsibilities. *See* James J. White et al., 4 *Uniform Commercial Code* § 32-1 (6th ed. database updated Oct. 2013) ("Of all judges, bankruptcy judges are the most likely to have experience with Article 9 and be conversant with its operation."). Fraudulent conveyance actions are, similarly, within bankruptcy courts' specialized area. Though the actions do exist under state law, they are principally heard in bankruptcy courts today. *See* Troy A. McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 Am. Bankr. L.J. 23, 52 (2012) ("Judging from an assessment of expertise, . . . fraudulent conveyance actions plainly belong in bankruptcy court. As a substantive matter, much of the caselaw development in fraudulent conveyance doctrine occurs in bankruptcy court."). Again, these considerations may not, by themselves, remove constitutional limitations on bankruptcy court authority over fraudulent conveyance actions, but they do reduce any structural concern by demonstrating a legitimate purpose to the authority.

The difficulty in determining the constitutional bounds of bankruptcy court adjudication of fraudulent conveyance actions (and other "core" matters under

§ 157(b)) in the absence of consent also weighs against structural concerns with permitting bankruptcy court adjudication when parties do consent. The Court itself has conceded that its cases in this area "do not admit of easy synthesis."[7] *Schor*, 478 U.S. at 847. Permitting consent to tip the scales in this situation does not present a structural concern. The "practical effect . . . on the constitutionally assigned role of the federal judiciary," *Schor*, 478 U.S. at 851, is extremely limited. The very uncertainty in the constitutional determination helps ensure that any shift of authority to bankruptcy courts is not structurally significant. It also prevents the bankruptcy court authority from representing any derogation of Article III courts. Recognizing the effect of consent in these proceedings serves the legitimate purpose of providing parties a means of settling a difficult and uncertain legal question without the need for expensive litigation. *Cf.* Hon. Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of Stern v. Marshall*, 86 Am. Bankr. L.J. 357, 358-59 (2012) ("Wasteful litigation over whether the bankruptcy court or the district

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[7] The Court has suggested that bankruptcy courts may properly decide matters central to a bankruptcy proceeding, but it has also emphasized that it has not actually reached that decision. *See Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011). Bankruptcy courts and practitioners, as a result, lack definitive guidelines regarding bankruptcy court authority over even the most basic bankruptcy proceedings.

court is the proper forum for adjudicating bankruptcy matters has exploded. . . . Litigating these disputes drains bankruptcy estate resources, delays the administration of bankruptcy cases, and reduces payment to creditors.").

The concerns are especially compelling in consumer bankruptcy matters. Resource constraints make consumer bankruptcy a high-volume practice area, amplifying the significance of efficiency in case management. The existing system already strains the viability of effective representation in these proceedings.* Parties to these proceedings rarely have the resources to litigate complex constitutional issues. These issues, therefore, present a significant threat to the system if parties have no clear path to avoid them other than accepting expensive and time-consuming multi-forum litigation. *See* Kent L. Richland, *Stern v. Marshall: A Dead-End Marathon?*, 28 Emory Bankr. Dev. J. 393, 413 (2012) ("Particularly where the bankruptcy estate is relatively small, keeping the entire matter in the bankruptcy court may be the

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* The pressures affect the representation of both debtors, *see, e.g.*, Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 122 (2012) ("Efficiency coupled with a high level of skill, while important in every area of law practice, is crucial to the success of a consumer bankruptcy practice."); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463, 1531 (2005) (describing the emergence of bankruptcy "mills"), and creditors, *see, e.g.*, *In re Taylor*, 655 F.3d 274, 277 (3d Cir. 2011) (describing an example of "overreliance [by a creditor's attorneys] on computerized processes in a high-volume practice").

only way to preserve the estate against excessive costs.").

II. Neither the statutory scheme nor constitutional strictures prevent a court from inferring consent from litigant conduct

When party consent is necessary to confer authority on a bankruptcy court to adjudicate a "core" matter under 28 U.S.C. § 157(a), the court may infer consent from party conduct. This Court's holdings clearly establish that Article III does not require express consent. In the absence of any statutory requirement for express consent, the relevant inquiry is simply whether the parties have in fact consented to the bankruptcy court adjudication. Express consent provides a significant indicium on this question, but nothing prevents a court from looking at other indicia.

No statutory provision mandates express consent for bankruptcy court adjudication of a fraudulent conveyance action. Because Congress classified fraudulent conveyance actions as "core" matters, subject to final adjudication by bankruptcy courts regardless of consent, the statute does not impose any consent requirement for these matters at all. The only cause for considering consent is its effect on constitutional issues. The statute, moreover, contains a clear indication that Congress does not believe that the constitutional issues require express consent, as the statute requires only consent *simpliciter* for the

analogous exercise of adjudicative authority over non-core matters. *See* 28 U.S.C. § 157(c)(2); *cf. Roell v. Withrow*, 538 U.S. 580, 587 (2003) ("These unadorned references to 'consent of the parties' [in 28 U.S.C. § 636(c)(1) and (c)(3) concerning referral to full-time magistrate judges] contrast with the language in § 636(c)(1) covering referral to certain part-time magistrate judges, which requires not only that the parties consent, but that they do so by 'specific written request.'").[*] The statute only requires *express* consent in the context of an authorization for a bankruptcy court to conduct a jury trial. *See* 28 U.S.C. § 157(e)."

In the absence of a statutory mandate of express consent, the remaining legal question is one this Court has already answered: whether courts may infer consent to adjudication by a non-Article III

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[*] Though Rules 7008(a) and 7012(b) of Federal Rules of Bankruptcy Procedure contain requirements that litigants state whether they consent to entry of final orders, these requirements are not jurisdictional. *See Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) ("[I]t is axiomatic that [the Rules of Bankruptcy Procedure] do not create or withdraw federal jurisdiction." (internal quotation marks omitted)). They merely reflect the practical reality that obtaining express statements of consent is procedurally preferable, to reduce the likelihood of later disputes about the effectiveness of consent. *See also Bellingham Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 569 (9th Cir. 2012) (reasoning that the *Roell* decision precludes any objection based on rule requirements because the Court in that case recognized implied consent at a time the Federal Rules of Civil Procedure required written consent).

tribunal from party conduct. In *Schor*, the Court stated directly that the party's consent would have been effective "[e]ven were there no evidence of an express waiver." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986). And in *Roell v. Withrow*, the Court was comfortable that the recognition of inferred consent in that case "substantially honored" the Article III right. *Roell*, 538 U.S. at 590.

The Court's approach to the question of implied consent recognizes that the ultimate constitutional question concerns actual consent. The difference between express consent and implied consent is only a difference in the method of determining actual consent. The Ninth Circuit below approached the issue in exactly this way, stating the relevant question as "whether EBIA did in fact consent to the bankruptcy court's jurisdiction" and, in considering that question, reviewing whether EBIA's litigation conduct implied its actual consent. *See Bellingham Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 567 (9th Cir. 2012).

The Petitioner asks the Court to create a rule prohibiting a finding of effective consent unless consent is an element of the statutory scheme. (Br. of Pet'r at 28-33.) This rule is unwarranted for the same reason that a requirement of express consent is unwarranted. A court's determination of implied consent is a determination of *actual* consent. It is not an imposition of deemed or constructive consent. Inferring actual consent necessarily involves a determination that a party understood its ability to

deny consent. The existence of a statutory scheme that specifically requires consent assists in the determination, but nothing makes it a necessity. In fact, the regulatory scheme at issue in *Schor* did not contain a specific consent requirement. *See Schor*, 478 U.S. at 836-37. Instead, the structure of the regulatory scheme meant that the "counterclaim-defendant manifested its consent by initiating a reparation action." (Br. of Pet'r at 29 n.1). The regulatory scheme, in other words, did not make consent a limiting factor; its structure merely facilitated the *inference* of consent *from litigant conduct*. (The *Roell* case, which presented questions regarding the effectiveness of consent notwithstanding a statutory consent requirement, *see* 538 U.S. at 587-88, also belies any argument that the existence of consent as a feature of the statutory scheme would eliminate questions regarding the effectiveness of consent.)

Courts should not infer actual consent lightly, but the Court has rejected the argument that courts may not do so when a litigant's conduct *does* indicate actual consent. In *Roell*, the Court directly considered the issue and refused to impose an express consent requirement, concluding the "bright line is not worth the downside." *Roell*, 538 U.S. at 590. As the Court noted, permitting parties to disavow their manifestations of consent after the fact wastes judicial resources and presents opportunities for abuse. *Id.* The Court highlighted similar considerations in *Stern*, noting the potential for severe consequences of a litigant "sandbagging" the court. These concerns are

particularly compelling in bankruptcy matters, which involve the allocation of interests in an estate that – in most cases – is insufficient to satisfy all obligations in full.

III. Bankruptcy courts have statutory authority to submit proposed findings of fact and conclusions of law in core proceedings

To the extent the court affirms the constitutional authority of the Bankruptcy Court to enter the order below, the case presents no apparent statutory question. The fraudulent conveyance action is plainly a "core" proceeding under 28 U.S.C. § 157(b)(2)(H), and the statute authorizes bankruptcy courts to exercise full adjudicative authority over core matters. *See* 28 U.S.C. § 157(b). But if the Court were to reverse the Bankruptcy Court's order on constitutional grounds, the case would present questions regarding the bankruptcy courts' subsidiary statutory authority over core matters, such as the authority to submit proposed findings of fact and conclusions of law. On this question, a strong consensus exists in the lower courts that bankruptcy courts do retain residual authority over core matters in this circumstance.[10] *See, e.g., Rothrock v. PNC Bank, N.A. (In re Parco*

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[10] Numerous district courts have also revised their standing orders of reference to accommodate constitutional limitations on bankruptcy court authority over statutory "core" proceedings. *See, e.g., Rothrock v. PNC Bank, N.A. (In re Parco Merged Media Corp.)*, 489 B.R. 323, 326 (D. Me. 2013).

Merged Media Corp.), 489 B.R. 323, 326 (D. Me. 2013) (collecting cases). The statute provides ample support for that conclusion.

The statute's lack of any specific authorization to submit proposed findings of fact and conclusions of law does not offer any indication that this authority is outside the scope of bankruptcy courts' powers. Congress had no cause to specify the authority in the statute it enacted because the statutory framework clearly builds on the premise that bankruptcy courts have the constitutional authority to enter final orders in the proceedings the statute designates as "core." The "core" appellation echoes the distinction Justice Brennan made in the *Marathon* plurality opinion between matters "at the core of the federal bankruptcy power" that "may well" involve public rights, and matters involving only "state-created private rights." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). Congress clearly intended the statute's "core" proceedings to correspond to the "core" proceedings that the *Marathon* opinion implied bankruptcy courts have the constitutional authority to decide under the "public rights" exception. For core proceedings, the statute provides full adjudicative authority. For the residual category of non-core proceedings, the statute provides lesser authority, including the power to submit proposed findings of fact and conclusions of law. *See* 28 U.S.C. § 157(c)(1).

The *Stern* holding does not strip bankruptcy courts of all authority with respect to the affected

core matters. The Court's opinion consistently addresses only the authority to enter a "final judgment." *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011) ("[T]his case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment. . . ."). In fact, one of the factors the Court cited in describing its holding as "narrow" was that "Pierce has not argued that the bankruptcy courts 'are barred from "hearing" all counterclaims' or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that 'finally decide[s]' them." *Id.* at 2620. The statute provides bankruptcy courts the authority to "hear and determine" core proceedings and to "enter appropriate orders and judgments," 28 U.S.C. § 157(b). At a bare minimum, therefore, the *Stern* decision leaves unaffected the bankruptcy court authority to "hear" these proceedings. *See Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 102 (1st Cir. 2004) ("[W]hether the . . . proceeding was core or non-core, the bankruptcy court was empowered to hear the case and receive evidence."). In this context, at least, the power to submit proposed findings of fact and conclusions of law is a corollary of this authority.[11] The relevant authorization is the authorization to

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[11] The Court need not conclude that the authority to "hear and determine" *always* includes the power to submit proposed findings of fact and conclusions of law in order to conclude that it would in this case. Context matters, and the context here overwhelmingly supports the conclusion that the powers Congress granted to bankruptcy courts over core matters are

(Continued on following page)

"hear" a proceeding. That authorization is what actually empowers a bankruptcy court, providing it authority, for example, to compel attendance at hearings and to receive and admit evidence. Whether the bankruptcy court also submits proposed findings of fact and conclusions law (which carry no legal weight) is more a matter of convenience for the district court than a question of the bankruptcy court's powers. Indeed, § 157(c)(1) presents the issue in exactly that way. The statutory language does not provide a grant of authority to submit proposed findings of fact and conclusions of law; it imposes a duty to do so in the proceedings the statute does grant the bankruptcy courts the authority to "hear." *See* 28 U.S.C. § 157(c)(1).

Bankruptcy courts also retain any residual authority, short of the authority to enter final orders, encompassed within the authority to "hear and determine" core proceedings and to "enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary."). The full adjudicatory

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sufficiently broad to include the power to submit proposed findings of fact and conclusions of law. The fact that 28 U.S.C. § 158 uses the same phrase does not undermine this conclusion in any way. In fact, it confirms the importance of context, as it is beyond dispute that a court's powers to "hear and determine" an appeal, 28 U.S.C. § 158(b)(6), are materially different than a court's powers to "hear and determine" a case in the first instance.

power authorized by 28 U.S.C. § 157(b) encompasses the lesser powers in subsection (c). Section 157 functions to allocate authority that is originally held by the Article III courts. *See Stern*, 131 S. Ct. at 2607 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction." (citation omitted)). When a district court refers a core proceeding to a bankruptcy court under § 157(b), it refers full authority over that proceeding to the bankruptcy court, subject only to appellate review. The district court does not retain any power to submit proposed findings of fact and conclusions of law. That "power" is part of the internal decision-making power that is referred to the bankruptcy court. If constitutional limits prevent the bankruptcy court from entering a final order, then the only power the Constitution requires to revert to the district court is the power to enter a binding decision. The bankruptcy court retains the (previously latent) authority to submit proposed findings of fact and conclusions of law.

This Court's decisions regarding the severability of unconstitutional statutory provisions focus on legislative intent. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). The history and statutory structure of 28 U.S.C. § 157 reveal "Congress' clear intent that, whenever a bankruptcy

court lacks the power to render a final judgment, it should render a report and recommendation." *Kirschner v. Agoglia*, 476 B.R. 75, 82 (S.D.N.Y. 2012). The initial creation of the bankruptcy court system stemmed from "the congressional perception of a lack of judicial interest in bankruptcy matters . . . : Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner." *Marathon*, 458 U.S. at 116 (White, J., dissenting) (citing H.R. Rep. No. 950595, p. 14 (1977)). After the *Marathon* decision invalidated a portion of the grant of authority to bankruptcy courts, Congress employed the "core" language of the *Marathon* plurality opinion in an obvious effort to provide bankruptcy courts with as much authority as the Constitution would permit. The framework the statute provides for handling these other proceedings offers a plain indication of the powers Congress intended bankruptcy courts to exercise when unable to enter final orders. The situation, therefore, differs markedly from the situation following the *Marathon* decision, when the Court had no indication of how Congress might choose to address the constitutional problem with its effort to "ensure adjudication of all claims in a single forum." *Marathon*, 458 U.S. at 87 n.40.

CONCLUSION

The adjudication of fraudulent conveyance actions by bankruptcy courts with the consent of the parties does not threaten any Article III interest. The personal interests protected by Article III are subject to waiver, and the structural interests are not implicated by these adjudications. In determining party consent, the relevant question is whether parties have actually consented. When a party's conduct clearly manifests consent, no constitutional limits prevent courts from inferring consent. Finally, even if bankruptcy courts did lack the constitutional authority to enter final orders in fraudulent conveyance actions with party consent, they would retain residual statutory authority sufficient to permit them to hear the proceedings and submit proposed findings of fact and conclusions of law to the district courts. For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER H. ARKISON, TRUSTEE, SOLEY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW HAMPSHIRE, WASHINGTON, HAWAII, SOUTH CAROLINA, OREGON, NEVADA AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF THE AMICI CURIAE..... 1

STATEMENT..... 4

SUMMARY OF ARGUMENT..... 8

ARGUMENT..... 10

I. ABSENT CONSENT, BANKRUPTCY COURTS MAY NOT NORMALLY ENTER FINAL JUDGMENTS IN AVOIDANCE PROCEEDINGS..... 10

II. BANKRUPTCY COURTS MAY ISSUE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN "NON-FINAL" CORE PROCEEDINGS..... 10

III. CONSENT TO A BANKRUPTCY COURT'S ENTRY OF A FINAL JUDGMENT IN A FRAUDULENT CONVEYANCE PROCEEDING GIVES THE COURT THE POWER TO ISSUE A FINAL JUDGMENT; HOWEVER, SUCH CONSENT MUST BE CLEAR AND UNEQUIVOCAL..... 16

A. The Ninth Circuit Correctly Ruled That Consent Of The Parties Could Authorize The Bankruptcy Court To Issue A Final Judgment..... 16

B. The Showing Of Consent Must Be Clear And Unequivocal..... 19

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page

Cases

Abramowitz v. Palmer,
999 F.2d 1274 (8th Cir. 1993)..... 21

Blixseth v. Brown,
470 B.R. 562 (D. Mont. 2012)..... 14

Canal Corp. v. Finnman (In re Johnson),
960 F.2d 396 (4th Cir. 1992)..... 21

Central Va. Comm. College v. Katz,
546 U.S. 363 (2006)..... 2

DuVoisin v. Foster (In re Southern Indus. Banking Corp.), 809 F.2d 329 (6th Cir. 1987)..... 21

Granfinanciera, S.A. v. Nordberg,
492 U S. 33 (1989)..... 5, 8

Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP), 464 B.R. 348 (N.D. Cal. 2011)..... 12

In re Nell,
71 B.R. 305 (D. Utah 1987)..... 21

Kirschner v. Agoglia,
476 B.R. 75 (S.D.N.Y. 2012)..... 14

Marshall v. Stern,
600 F.3d 1037 (9th Cir. 2010)..... 7-8

Messer v. Bentley Manhatten, Inc. (In re Madison Bentley Assocs., LLC),
474 B.R. 430 (S.D.N.Y. 2012)..... 21

Miller v. Grosso (In re Miller),
467 B.R. 677 (Bankr. D. Mass. 2012)..... 14

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC), 472 B.R. 731 (E.D. Ky. 2012)..... 14

Peretz v. United States,
501 U.S. 923 (1991).....17, 18

Roell v. Withrow,
538 U.S. 580 (2003)..... *passim*

Rosenberg v. Harvey A. Bookstein Corp.,
479 B.R. 584 (D. Nev. 2012)..... 14

Rothroch v. PNC Bank, N.A. (In re Parco Merged Media Corp.), 489 B.R. 323 (D. Me. 2013)..... 14

Securities Investor Protect. Corp. v. Bernard L. Madoff Inv. Sec., LLC,
490 B.R. 46 (S.D.N.Y. 2013)..... 14

Sheridan v. Michels (In re Sheridan),
362 F.3d 96 (1st Cir. 2004)..... 21

Stern v. Marshall,
131 S. Ct. 2594 (2011)..... *passim*

Thomas v. Arn,
474 U.S. 140 (1985)..... 17

Weisfelner v. Blavatnik (In re Lyondell Chem. Co.),
467 B.R. 712 (S.D.N.Y. 2012)..... 21

Wellness Int'l Network, Ltd. v. Sharif,
727 F.3d 751 (7th Cir. 2013)..... 11, 18

Zazzali v. 1031 Exchange Grp. (In re DBSI, Inc.),
467 B.R. 767 (Bankr. D. Del. 2012)..... 14

Statutes

11 U.S.C. § 502(d)..... 10

28 U.S.C. § 157..... 11, 12, 13, 18

28 U.S.C. § 157(b)(2)..... 6

28 U.S.C. § 157(b)(3)..... 12

28 U.S.C. § 157(c)..... 13

28 U.S.C. § 157(c)(1)..... 6, 13

28 U.S.C. § 157(c)(2)..... 7, 13, 16

28 U.S.C. § 636(c)(1)..... 16, 17

28 U.S.C. § 636(c)(3)..... 17

Other Authorities

The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison)..... 2

The Federalist No. 78, p. 494 (B. Wright ed. 1961) (A. Hamilton)..... 2

Rules

Fed. R. Bankr. P. 7008(a)..... 21

Fed. R. Bankr. P. 7012(b)..... 21

INTEREST OF THE *AMICI CURIAE*

The initial issue in this case is whether the bankruptcy courts may "hear and determine" statutory "core proceedings" involving fraudulent conveyance actions brought during bankruptcy cases consistent with Article III of the United States Constitution. The Ninth Circuit concluded that they may not. Also at issue is whether a bankruptcy court, hearing a proceeding that has been statutorily designated by Congress as "core," but in which the Constitution bars it from issuing a final judgment, may nonetheless provide proposed findings of fact and conclusions of law to the district court. The final questions addressed below are whether, in such a proceeding, a party can effectively consent to have final judgment entered by the bankruptcy court, rather than by an Article III court, through litigation conduct, and, if so, how such consent must be manifested. These are issues of importance to States which regularly find themselves parties in actions brought by bankruptcy debtors and trustees in both core and non-core proceedings in bankruptcy cases.

The special sovereignty interests of the States make them uniquely interested in the proper resolution of those issues. Article III, in addition to being an important structural element of the Constitutional balance of powers, also provides the States, as with other litigants, a personal right to have issues involving their "private rights" determined by an independent federal judiciary. States find themselves haled into bankruptcy courts outside of their own territory with frequency, particularly since this Court held that Article I's

Bankruptcy Clause was "intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena." *Central Va. Comm. College v. Katz*, 546 U.S. 363, 356 (2006). Article III protects both the structural concerns arising from the Constitutional separation of powers and the personal rights of litigants to be guaranteed the right to be heard before an independent judiciary.

As a result, Article III jurisdiction also serves to protect state sovereignty with respect to private rights that was not given up in the plan of the Convention. *See Katz*, 546 U.S. at 373; *see also* The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison) (Constitution respects the States' "residuary and inviolable sovereignty over all other objects" the boundary of which Article III courts will impartially decide to "prevent an appeal to the sword and a dissolution of the compact..."). Thus, *Amici* have a pronounced sovereign interest in the protections afforded by Article III courts in the adjudication of private rights as a bulwark against encroachment into States' sovereignty by the political branches. *See* The Federalist No. 78, p. 494 (B. Wright ed. 1961) (A. Hamilton) ("the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments"). In bankruptcy cases, Article III jurisdiction plays an important role protecting state sovereignty.

The States also have an interest in ensuring that, when they are haled into sometimes far flung bankruptcy jurisdictions, they are not deemed to waive important rights guaranteed under the

Constitution in the absence of clear and predictable standards and rules. Important constitutional protections should not be subject to different standards in different states, particularly inasmuch as bankruptcy is required to be a "uniform" federal law. In light of the broad venue provisions available to debtors, a non-resident litigant should not be left without clear guidance from this Court as to how to assert its rights.

Finally, the States have an interest as important creditors of bankruptcy estates, in many instances holding priority and other claims owed to themselves and their citizens, such as for taxes, domestic support obligations, environmental clean-up costs, fines and penalties, and employee wages and benefits. In their capacity as creditors, it is important to the States that a ruling by this Court not be used to "roil[] the prevailing bankruptcy schema" Pet. App. p. 26a, by barring bankruptcy courts from taking any role in litigation of "non-final core" proceedings[1] that can serve a vital role in bringing additional revenues into the estate.

The economic effect of preventing the bankruptcy courts from even being able to enter proposed findings of fact and conclusions of law for

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[1] The term "non-final core proceedings" is used herein to refer to the category of proceedings that fall under the holding in *Stern* – those that are statutorily core but as to which the bankruptcy courts are precluded, absent special circumstances, from entering final judgments.

the district court to review *de novo* would be significant. It would hurt all creditors by inviting wasteful litigation over where to litigate and by imposing procedural burdens at odds with the efficiency that bankruptcy cases require to be successful. The economic costs of such litigation will impair the ability of States to recover amounts they are owed and their ability to advance the important public purposes to which such recoveries would be dedicated.

STATEMENT

Peter Arkison, a Chapter 7 bankruptcy trustee for the Chapter 7 debtor, Bellingham Insurance Agency, Inc. ("BIA"), brought a proceeding against two non-bankrupt defendants, Aegis Retirement Income Services, Inc. ("ARIS") and Executive Benefits Insurance Agency, Inc. ("EBIA") seeking to recover funds fraudulently transferred pre-bankruptcy to them by BIA. Pet. App. pp. 4a-8a. The bankruptcy court entered summary judgment in favor of the trustee for $373,291.28. Pet. App. pp. 6a-7a. On appeal, the district court affirmed the judgment. *Id.* at 7a. After briefing was completed at the Ninth Circuit, however, EBIA moved the appeals court to vacate the judgment for lack of subject-matter jurisdiction, citing *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Pet. App. p. 8a. EBIA had never before challenged the bankruptcy court's subject matter jurisdiction to hear the case on the basis that it was entitled to an Article III court's adjudication of the claims that the trustee had brought against it. *Id.* at 30a. In light of that timing, and in light of its prior litigation tactics, the Ninth Circuit found that EBIA

had impliedly consented to the bankruptcy court's jurisdiction and affirmed the bankruptcy court's ruling. *Id.* at 30a & 39a-40a.

In reaching that conclusion, the Ninth Circuit noted that, while EBIA, the defendant in the trustee's fraudulent conveyance action, had not filed a proof of claim with the bankruptcy court, so as to affirmatively invoke its jurisdiction, it had taken other steps that appeared to signify consent. It had initially demanded a jury trial on the trustee's action, which the district court treated as a motion to withdraw the reference of the case. *Id.* at 29a. When the trustee sought summary judgment, though, EBIA affirmatively moved to hold the district court action in abeyance while the trustee's request was heard. *Id.* After the bankruptcy court granted summary judgment, EBIA abandoned its jury trial demand, and did not pursue the withdrawal request further and instead pursued an appeal of the bankruptcy court's order. *Id.* at 29a-30a.

In denying the Petitioner's motion to vacate and affirming the bankruptcy court's judgment, the Ninth Circuit first held that this Court's decisions in *Stern v. Marshall* and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) would normally require an Article III court, not a bankruptcy judge, to adjudicate a proceeding brought against a non-creditor to recover a fraudulent conveyance for a bankruptcy estate. *Id.* at 22a-23a.

Next, the Ninth Circuit noted that its decision on the Article III question created a gap in the statutory framework for the division of labor between

the bankruptcy and district courts with respect to core and non-core proceedings. Pet. App. at p. 23a-24a. In that regard, under section 157(b)(2) of Title 28, fraudulent conveyance actions are unmistakably designated as "core" proceedings, and the statute provides that the bankruptcy courts may "hear and determine" such matters; *i.e.*, issue final judgments therein. Conversely, Congress provided, in section 157(c)(1), that bankruptcy courts could only issue proposed findings of fact and conclusions of law in "non-core" proceedings. The statute does not deal with the case of a proceeding that is statutorily core but where the bankruptcy court is precluded by the Constitution from issuing a final judgment. Thus, there is nothing in the statute that explicitly instructs how to deal with the anomaly created under *Stern* of a "core proceeding" in which the bankruptcy court may not, constitutionally, enter a final judgment.

The Ninth Circuit reasoned, though, that because "only the power to enter final judgment is abrogated" by its decision on the Article III issue, *id.* at 25a, Congress' general intention, as set out in the statute, to allow the bankruptcy courts the broader power to "hear and determine" issues necessarily included the "more modest power" to simply render findings and rulings for the district court to review *de novo* and determine whether to enter as final judgments. *Id.* at 24a.

Finally, the Ninth Circuit concluded that the Petitioner had waived its right to claim that the bankruptcy court's final judgment was invalid by failing to raise the issue in a timely fashion and had,

through its conduct, impliedly consented to bankruptcy court jurisdiction. *Id.* at 26a-33a. The court determined that "'as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver.'" *Id.* at 27a-28a (*quoting Stern v. Marshall*, 131 S. Ct. at 2607). The court also noted that section 157(c)(2) expressly provides for consent to full bankruptcy court jurisdiction in the case of conceded "non-core" proceedings, and there was no reason to grant any lesser authority to the bankruptcy court in hearing a non-final "core" proceeding. *Id.* at 28a.

Under the facts before it the Ninth Circuit easily concluded that the Petitioner had actually consented to the final adjudication by the bankruptcy court through its litigation conduct. *Id.* at 29a. The court interpreted the Petitioner's petition to suspend the proceedings before the district court and subsequent withdrawal of its jury trial demand, in favor of allowing the bankruptcy court to decide the summary judgment motion, as clearly indicating an intention to allow the latter court to resolve the issues. *Id.* Moreover, the Court also relied on the fact that the Petitioner did not raise a constitutional objection to the bankruptcy court's jurisdiction until the issues were briefed before it in 2011, despite the Ninth Circuit's opinion in *Marshall v. Stern*, 600 F.3d 1037 (2010) which had clearly raised these constitutional issues. *See id.* at 29a, 32a. The court did not find it conclusive that the consent had not been expressly stated, despite provisions in the Bankruptcy Rules providing for such a statement, relying on *Roell v. Withrow*, 538 U.S. 580 (2003). Pet.

App. p. 31a-32a. Quoting from this Court's decision in *Stern*, the court said "'the consequences of a litigant sandbagging the court – remaining silent about its objection and belatedly raising the error only if the case does not conclude in its favor – can be ... severe.'" Pet. App. p. 33a (*quoting Stern v. Marshall*, 131 S. Ct. at 2609).

SUMMARY OF ARGUMENT

The *Amici States* urge the Court to affirm the judgment below. The Ninth Circuit was correct that a fraudulent conveyance proceeding is one which the Constitution requires be presided over by an Article III judge. The Court's decision in *Stern v. Marshall* and its reliance on *Granfinanciera v. Nordberg* made this conclusion inescapable. But this is not the difficult issue faced with this appeal. The more challenging issues are whether a bankruptcy court can bridge the gap that results when a statutorily core proceeding cannot be heard to finality by a bankruptcy court because of Article III, by issuing findings of fact and conclusions of law for the district court to review and issue judgment. The other unsettled issue is the determination of the appropriate standard for finding that a party has consented to the bankruptcy court's entry of final judgment and thereby waived the party's right to an Article III tribunal.

The *Amici States* agree with the vast majority of the courts around the nation that have found that the bankruptcy courts can bridge the gap and enter findings of fact and conclusions of law. These courts do so by taking a big picture look, noting that the

bankruptcy courts' subject matter jurisdiction for such matters is clear. The Court concluded *Stern* noting that the ruling there was not intended to change the division of labor between the bankruptcy and the district court. The Ninth Circuit's judgment is sustainable because it does not disturb the division of labor in the prevailing schema.

The *Amici States* diverge with the Ninth Circuit somewhat over the consent issue. The court below concluded that under existing ninth circuit law a simple failure to object is sufficient to consent and waive Article III protections. In the proceedings below there was a relatively clear consent and waiver and therefore the *Amici States* do not argue with the judgment. Courts across the nation, however, do not have a uniform approach to this issue. Some conclude that no consent is possible. For others, consent is easily implied by the failure to object. Other courts are at various degrees of clarity in between these two extremes. The standard the court below applied leaves much to be desired. *Amici States* urge the Court in affirming the judgment below to adopt for bankruptcy purposes the same approach that it employed in *Roell v. Withrow*. That standard, that consent may only be found where the party clearly knew of the need for consent and the right to refuse it, and still voluntarily appeared, provides greater certainty for parties litigating these matters and provides much needed uniformity across the hundreds of bankruptcy court jurisdictions in the nation. The U.S. Magistrate practice is a close cognate to the bankruptcy court jurisdiction and the standard is familiar to district and appeals courts

and thus has an established presence in the proceedings of those courts.

ARGUMENT

I. ABSENT CONSENT, BANKRUPTCY COURTS MAY NOT NORMALLY ENTER FINAL JUDGMENTS IN AVOIDANCE PROCEEDINGS.

For the reasons discussed persuasively in the opinion below, the *Amici States* agree with the Ninth Circuit that the fraudulent conveyance action (absent a filed claim to which the action may be raised as a defense under 11 U.S.C. § 502(d)) is one that a party may demand be heard before an Article III judge. Thus, to the extent that the bankruptcy court "heard and determined" the matter below and issued a purportedly final judgment, if properly and timely challenged by the aggrieved party, its actions cannot stand.

II. BANKRUPTCY COURTS MAY ISSUE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN "NON-FINAL" CORE PROCEEDINGS.

As unsecured creditors in a multitude of bankruptcy cases around the nation, the *Amici* are keenly interested in preserving the bankruptcy court's efficient administration of the marshaling activities of trustees and debtors in possession. Bankruptcy estates have become increasingly 'bankrupt' since the 1978 reforms with fewer and fewer assets available for liquidation and distribution to any other than secured creditors. The costs of

administration in increasingly complex and prolonged cases also has multiplied and threatens the economic recoveries of unsecured creditors. In light of these factors, the ability of bankruptcy trustees and others in control of the process to recover assets disposed of fraudulently or preferentially prior to bankruptcy or to recover for breaches of contract or other non-bankruptcy claims takes on an outsized importance and is essential for unsecured creditors to realize anything on their claims.

The Ninth Circuit held that 28 U.S.C. § 157 was not an obstacle to the power of a bankruptcy court to enter proposed findings of fact and conclusions of law in "non-final core proceedings." Pet. App. pp. 23a-26a. The *Amici States* agree. The court at that point was not dealing with the issue (discussed later) of whether parties could consent to a *final* judgment; rather, it was dealing only with the relatively modest question of whether the bankruptcy court had *any* power to act under the express language of section 157. As noted, the section states that bankruptcy courts may "hear and determine" *i.e.*, issue final judgments, in *core* proceedings and may issue non-final "proposed findings and conclusions" in *non-core* proceedings. Section 157 does not explicitly authorize the court to enter such proposed findings and conclusions in the anomalous context of "non-final core proceedings."

While some courts, such as the Seventh Circuit in *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), have concluded that this Court's analysis in *Stern* is so far-reaching that they must oust bankruptcy courts from *any* trial jurisdiction

with respect to such actions, the *Amici States* disagree. As the Ninth Circuit held, *Stern* did not intend to impose such a dramatic and far-reaching contraction of the bankruptcy court's authority. To the contrary, this Court emphasized that it did not view its actions as "meaningfully chang[ing] the division of labor in the current statute," and that the question it was resolving was a "narrow one." *Stern*, 131 S. Ct. at 2620. As a result, nearly every court to have considered this issue has held that the division of authority in section 157 was not intended to preclude the bankruptcy courts from handling such "non-final core proceedings' in a way akin to that of non-core matters. *See Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, 464 B.R. 348, 355-56 (N.D. Cal. 2011) (detailing cases).[2]

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[2] The list of matters that are core is non-exclusive and the statute also clearly contemplates that the bankruptcy court must determine whether a matter before it is core or non-core. 28 U.S.C. § 157(b)(3). As an alternative to the discussion below, it could also be argued that, once the bankruptcy court has determined under section 157(b)(3) that a matter is one where it is *constitutionally* barred under *Stern* from issuing a final decision, such a conclusion should be treated as necessarily excluding the matter from the list of statutory core proceedings. Such matters are ones where Congress intended that final determinations can be allowed; if that is unconstitutional, then a solution is to excise the particular matter from the listing of core proceeding. Under that approach, then without doing any violence to the statute and consistent with its workings, the court could proceed with the matter under section 157(c), since it is clearly still at least "related to" the bankruptcy and within its subject matter jurisdiction.

With respect to the statutorily non-core claims that are outside the bankruptcy court's authority under Article I to issue final judgments, Congress authorized the bankruptcy courts to make findings and conclusions for submittal to the district court for entry of final judgment. 28 U.S.C. § 157(c)(1) and (2).

Although the Constitution may bar bankruptcy courts from entering final judgments on some matters that Congress had intended be allowed, nothing in *Stern* suggests that this Court's finding of a constitutional violation in that "one isolated respect," *Stern*, 131 S. Ct. at 2621, was meant to preclude bankruptcy courts from exercising the lesser power of issuing a proposed finding of facts and conclusions for *de novo* review in these "non-final core proceedings," just as it could with "non-core" matters that are "non final." The Court specifically noted in *Stern* that Marshall had not argued that the bankruptcy court was barred from hearing the counterclaim filed against him, but only that the district court should enter final judgment thereon. That is precisely the approach adopted here by the Ninth Circuit; the *Amici States* submit it is wholly in accordance with the approach taken by this Court in *Stern*.

Thus, the vast majority of courts have held since *Stern*, in agreement with the Ninth Circuit here, that the authority to hear these matters falls within the bankruptcy court's subject matter jurisdiction over core and non-core matters and that the ability to enter proposed findings and conclusions on these "non-final core proceedings" is a lesser included power of the bankruptcy court to enter final

judgments on such matters as stated in section 157. *See, e.g., Securities Investor Protect. Corp. v. Bernard L. Madoff Inv. Sec., LLC*, 490 B.R. 46, 55-58 (S.D.N.Y. 2013); *Rothroch v. PNC Bank, N.A. (In re Parco Merged Media Corp.)*, 489 B.R. 323, 325-26 (D. Me. 2013); *Rosenberg v. Harvey A. Bookstein Corp.*, 479 B.R. 584, 589-91 (D. Nev. 2012); *Kirschner v. Agoglia*, 476 B.R. 75, 82 (S.D.N.Y. 2012); *Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC)*, 472 B.R. 731, 742-43 (E.D. Ky. 2012); *Blixseth v. Brown*, 470 B.R. 562, 571-72 (D. Mont. 2012); *see also Zazzali v. 1031 Exchange Grp. (In re DBSI, Inc.)*, 467 B.R. 767, 774-75 (Bankr. D. Del. 2012); *Miller v. Grosso (In re Miller)*, 467 B.R. 677, 683-84 (Bankr. D. Mass. 2012).

It is critical that the bankruptcy courts retain this power. Far from protecting either litigants or the system, precluding bankruptcy courts from hearing these "non-final core proceedings" would conflict with the basic principle that bankruptcy is designed for the "honest but unfortunate debtor" by rewarding and encouraging those that simply seek to delay and confound resolution of important portions of the case. This is particularly true with respect to allegations of fraud regarding prebankruptcy transfers in that such a ruling would take even the basic litigation issues in this area away from the bankruptcy courts and load them onto district courts that will be hard-pressed to find time to hear such matters.

In many cases, the primary, if not the only, unencumbered asset of the estate is the right to seek

recovery of preferences and fraudulent conveyances. Similarly, the ability to marshal the debtor's assets, including the right to collect on amounts owed to it, in order to fund payments to creditors has always been a fundamental, *i.e.*, "core," part of the duties of the debtor or its trustee in a bankruptcy proceeding. While, to be sure, as this Court held in *Marathon* and *Stern*, there are constitutional limits on the bankruptcy court's powers in those regards, it would, however, unnecessarily "roil[] the prevailing bankruptcy schema" to hold that the bankruptcy court could play *no* role in such matters. Pet. App. p. 26a.

Nothing in this Court's analysis in *Stern* and its careful noting of the limited scope of the opinion can be read to suggest such a dramatic expansion of its effect. If Congress intended to allow bankruptcy courts to take such action with regard to the relatively less important matters that comprise the statutorily "non-core" issues in the case, it cannot reasonably be assumed that it intended to deny that power to the bankruptcy courts with respect to matters as to which it had tried to accord them full, unencumbered powers of decision, but which, under the Court's precedents can only be finally determined by an Article III judge.

III. CONSENT TO A BANKRUPTCY COURT'S ENTRY OF A FINAL JUDGMENT IN A FRAUDULENT CONVEYANCE PROCEEDING GIVES THE COURT THE POWER TO ISSUE A FINAL JUDGMENT; HOWEVER, SUCH CONSENT MUST BE CLEAR AND UNEQUIVOCAL.

A. The Ninth Circuit Correctly Ruled That Consent Of The Parties Could Authorize The Bankruptcy Court To Issue A Final Judgment.

The *Amici States* agree with the Ninth Circuit, and the vast majority of other courts that have considered the issue, that bankruptcy courts may exercise full decisional authority with respect to these "non-final core proceedings" if the parties consent. As suggested above, the exercise of that authority is conceptually no different than the authority that has been given to bankruptcy judges to issue final decisions in non-core "related to" matters with the consent of the parties. 28 U.S.C. § 157(c)(2). This has never been questioned by the Court, and nothing in the nature of this new category of "non-final core proceedings" suggests that any different treatment is required.

In that regard, the authority of bankruptcy judges is a close cognate to that of magistrate judges. Section 636(c)(1) of the Federal Magistrate Act provides that "Upon consent of the parties, a . magistrate judge may conduct *any or all proceedings* in a jury or nonjury civil matter and *order the entry of judgment* in the case, when

specially designated to exercise such jurisdiction by the district court or court he serves." Magistrate judges, like bankruptcy judges, are not appointed under Article III. They are modestly less insulated from political pressures than bankruptcy judges: they are appointed by the district court, not the Court of Appeals; they serve for only eight years, rather than fourteen; their office can be abolished if the district court decides they are no longer needed; they serve after age 70 only with the annual approval of the district court; and they can be removed by a simple majority vote of the district court judges (all in contrast to bankruptcy judges who serve a fixed term, once appointed). A final decision made by the magistrate judge is then subject to appeal directly to the Court of Appeals, under section 636(c)(3), without even the intermediate level of district court review provided with respect to bankruptcy court decisions.

Yet this Court has reviewed issues relating to the authority of magistrate judges on numerous occasions without finding that there was anything suspect in the authority granted to them under the Act. In *Thomas v. Arn*, 474 U.S. 140, 141-42, 149-50 (1985), for instance, this Court had held that *de novo* review by the district court was needed for a decision by the magistrate judge only if objections were filed. Similarly, in *Peretz* the Court stated, "The statutory provision we upheld in *Raddatz* provided for *de novo* review only when a party objected to the magistrate's findings or recommendations. *See* 28 U.S.C. § 636(b)(1). To the extent *de novo* review is required to satisfy Article III concerns, it need not be exercised

unless requested by the parties." *Peretz v. United States*, 501 U.S. 923, 939 (1991).

In short, there is no meaningful difference for separation of powers purposes between the authority given magistrate judges, and that given to bankruptcy judges. Accordingly, there is no basis for limiting the degree to which consent of the parties can allow for entry of final judgment on these "non-final core" proceedings. In that regard, the *Amici States* disagree with the position recently taken by the Seventh Circuit. *See Sharif*, 727 F.3d at 773. In *Sharif*, after first concluding that the appellant could not waive the issue and, so, could belatedly raise the issue upon appeal, the Seventh Circuit then held that those same concerns also precluded any use of *consent* by the parties to allow the bankruptcy court to adjudicate the matter. The court held that the only remedy – if it were found on remand that the claim was statutorily core – would be for the district court to withdraw the order of reference on the matter and take it over for *de novo* handling. *Id.* at 777.

Such an ossified reading of the scope of the language in section 157 appears to go far beyond what this Court contemplated in *Stern*, could not possibly be what Congress intended, and simply is not dictated by the plain meaning of the statute. The judicial power suffers no erosion by the mere entry of proposed findings and conclusions by a bankruptcy judge. And the use of consent to allow the bankruptcy court to exercise the greater authority of entering a final judgment falls well within the

established case law dealing with "related to" jurisdiction and the authority of magistrate judges.

The *Amici States* urge that this Court expressly hold that bankruptcy courts may enter final judgments in "non-final core proceedings," if the parties consent.

B. The Showing Of Consent Must Be Clear And Unequivocal.

While the *Amici States* agree that consent *can* authorize the bankruptcy court's exercise of power and waive the party's right to insist upon an Article III adjudication, it leaves unanswered the question of how such consent and waiver must be demonstrated. The question of consent to jurisdiction and waiver of Article III protection in a given proceeding is one of great significance to *Amici*. Because Article III provides both personal and structural safeguards, and those safeguards are especially crucial as the benefit of the bargain that the States made in the Plan of the Convention, waiver and consent must be strictly controlled and transparently provided for through legislation or court rule making. *Ad hoc* determinations of consent and waiver through litigation conduct, without clear standards, cannot be the basis for surrender of such an important personal right and such an important part of our nation's constitutional federalism.

While this Court has required clear and unmistakable consent with respect to Article III proceedings in the context of practice before U.S. Magistrates, the court below apparently embraced a lower standard. This Court held in *Roell v. Withrow*

that consent to a trial by a U.S. Magistrate may be implied where "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Roell*, 538 U.S. at 590.

When the Petitioner in this case agreed to the entry of summary judgment by the bankruptcy court, took no steps to protect its request to withdraw the reference, and did not raise the Article III objection until the eve of its appellate argument before the Ninth Circuit, the court there took the totality of those actions as indicating an implied assent to the entry of final judgment by the bankruptcy court. However, in stating in broad terms that a failure to timely object, standing alone, might be sufficient to find the requisite consent, Pet. App. p. 28a ("a bankruptcy litigant impliedly consents to the bankruptcy court's jurisdiction when he fails to timely object."), the Ninth Circuit's analysis sets a standard that the *Amici States* believe is too low for such an important issue. While, on the facts here, we do not believe the court's ultimate conclusion was necessarily incorrect, the *Amici States* believe it is important that this Court confirm that the standard must be at least as strong as that stated in *Roell*. *Roell* did not rely merely on a generalized failure to object in the face of a statutory provision that allowed for such an objection. Rather, the defendant there was specifically apprised of the need for consent and his right to object and yet still did nothing. The issue in that case was simply whether the failure to follow the very specific provisions of a supplementary rule describing how to register consent or objection would

preclude a finding of consent if the party's actions otherwise appeared to be sufficient to satisfy the statutory requirements that consent be found. *Roell*, 538 U.S. at 588-90 & n.5.

In that regard, the First Circuit permits implied consent by conduct but only where the evidence of consent drawn from such conduct is "affirmative and unambiguous" and is not merely a failure to object. *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 101-102 (1st Cir. 2004). Other courts hold that under the Federal Rules of Bankruptcy Procedure a bright-line is required and no implied consent is permitted. *See, e.g., Messer v. Bentley Manhatten, Inc. (In re Madison Bentley Assocs., LLC)*, 474 B.R. 430, 436-37 (S.D.N.Y. 2012) ("The test for consent is strict .... Mere implied consent 'appears to be insufficient.'"); *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712, 722 (S.D.N.Y. 2012); *In re Nell*, 71 B.R. 305, 311 (D. Utah 1987). By contrast, the Fourth, Sixth, and Eighth Circuits have suggested that implied consent is enough and may be shown simply by a failure to object (at least with respect to non-core proceedings). *See Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 403-404 (4th Cir. 1992); *DuVoisin v. Foster (In re Southern Indus. Banking Corp.)*, 809 F.2d 329, 331 (6th Cir. 1987); and *Abramowitz v. Palmer*, 999 F.2d 1274, 1280 (8th Cir. 1993).

The Ninth Circuit's "consent by failure to object" approach seems to lack a predictable standard and instead suggests that a bankruptcy court can find consent whenever the party's conduct bears "considerable indicia of consent." Pet. App. p. 29a.

Such an approach leaves to each bankruptcy court to devise in each instance a formula of its own making. By contrast, in *Roell*, this Court bounded the lower court's latitude with a requirement that any finding of consent be based upon a knowing decision of the party as to whether to exert or waive those personal rights.

While the First Circuit's "affirmative and unambiguous" requirement is better than the Ninth Circuit's more amorphous approach, this Court's clearer standard would provide the most certainty to litigants, while still protecting against the efforts of parties to try to "sand-bag" the proceedings by waiting to raise the issue until they saw whether or not they would win the underlying litigation.

The question of the quantum necessary for a fair and predictable implied consent, consistent with the level of gravity that Article III's personal and structural elements merit, is now squarely before the Court. For the *Amici States*, the Court's approach in *Roell* best addresses it and should be applied to the nearly identical circumstances faced regularly in non-core bankruptcy proceedings. The Bankruptcy Rules[4] do require parties to affirmatively state their position on this issue and that will, in the main, prove sufficient to resolve the matter in the future. There will no doubt be cases where that does not suffice, however, and the *Amici States* believe that a clear

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[4] Fed. R. Bankr. P. 7008(a) and 7012(b).

statement as to the minimum indicia of consent will be of tremendous benefit to all parties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-1200

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF NVIDIA CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

CONSTITUTIONAL AND STATUTORY BACKGROUND 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. BANKRUPTCY COURTS MAY RESOLVE ANY CAUSE OF ACTION THAT MUST BE DECIDED AS PART OF THE CLAIMS ALLOWANCE PROCESS 10

A. This Court Has Repeatedly Explained That Bankruptcy Courts May Resolve Causes Of Actions That Are A Necessary Part Of The Claims Allowance Process 10

B. Historical Practice Confirms That Bankruptcy Courts May Resolve Causes Of Actions That Are A Necessary Part Of The Claims Allowance Process 17

C. The Ninth Circuit Should Not Have Vacated The *Brandt v. NVIDIA* Hearings 20

TABLE OF CONTENTS
(continued)

Page

II. THE SCOPE OF ANY BANKRUPTCY COURT AUTHORITY THAT IS BASED ON LITIGANT CONSENT IS DISTINCT FROM AUTHORITY THAT IS NECESSARY TO RESOLVE THE CLAIMS ALLOWANCE PROCESS 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Brandt v. NVIDIA Corp., et al. (In re 3dfx Interactive, Inc.),
389 B.R. 842 (Bankr. N.D. Cal. 2008) ..... *passim*

Brandt v. NVIDIA Corp., et al. (In re 3dfx Interactive, Inc.), Slip. Op.
Case No. 08-cv-04634-RMW (N.D.Cal. Dec. 20, 2010) 2

Executive Benefits Inc. Agency v. Arkison (In re Bellingham),
702 F.3d 553 (9th Cir. 2012) 7, 15, 21

Executive Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham),
No. 11-35162 (9th Cir.) 2, 3

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 6, 8, 13, 14

Katchen v. Landy,
382 U.S. 323 (1966) ..... *passim*

Langenkamp v. Culp,
498 U.S. 42 (1990) 8, 14, 15, 20

Lingan v. Bayley,
1 D.C. 112 (1 Cranch D.C. 1802) 19

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(continued)

Page(s)

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Onkyo Europe Elecs. GMBH v. Global Technovations Inc. (In re Global Technovations Inc.),
694 F.3d 705 (6th Cir. 2012) 11, 16, 20

Ortiz v. Aurora Health Care, Inc. (In re Ortiz),
665 F.3d 906 (7th Cir. 2011) 16

Pirie v. Chicago Title & Trust Co.,
182 U.S. 438 (1901) 11

Stern v. Marshall,
131 S. Ct. 2594 (2011) ..... *passim*

Waldman v. Stone,
698 F.3d 910 (6th Cir. 2012) 15, 16, 21

Wellness Int'l Network Ltd. v. Sharif,
__ F.3d __, No. 12-1349, 2013 WL 4441926 (7th Cir. Aug. 21, 2012) 21

Wood v. Owings,
5 U.S. 239 (1803) 17

Constitutional Provisions

U.S. Const. art. III ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes & Regulations

Bankruptcy Act of 1800, 2 Stat. 19 (repealed 1803) 18

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Bankruptcy Act of 1867, 14 Stat. 517, *et seq* 19

Bankruptcy Act of 1898, 30 Stat. 544 *et seq.* 19

Bankruptcy Act of 1938, 52 Stat. 840 (repealed 1978) 20

11 U.S.C. § 501 6

11 U.S.C. § 502 6

11 U.S.C. § 541 6

11 U.S.C. § 547 11

28 U.S.C. § 151 5

28 U.S.C. § 152(a)(1) 5

28 U.S.C. § 157(a) 5

28 U.S.C. § 157(b) 3

28 U.S.C. § 157(b)(1) 6, 7

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 157(b)(2)(A) 7

28 U.S.C. § 157(b)(2)(B) 7

28 U.S.C. § 157(b)(2)(H) 7

28 U.S.C. § 157(b)(3) 6

28 U.S.C. §§ 157(c)(1), (2) 6

28 U.S.C. § 1334(a) 5

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae NVIDIA Corporation ("NVIDIA") is a public company based in Santa Clara, California, that designs and sells semiconductor products. NVIDIA has an interest in this petition because the U.S. Court of Appeals for the Ninth Circuit appears to believe that resolution of the question presented may have direct application to a pending Ninth Circuit appeal involving NVIDIA.

In December 2000, NVIDIA entered into an asset purchase agreement to buy substantially all of the assets of another Silicon Valley semiconductor company, 3dfx Interactive, Inc. ("3dfx"). Later, 3dfx filed a bankruptcy petition under chapter 11 of the Bankruptcy Code. NVIDIA timely filed a proof of claim in the chapter 11 case based on 3dfx's prepetition breach of the agreement. In response, William A. Brandt, Jr., the trustee for 3dfx's bankruptcy estate, commenced an adversary proceeding against NVIDIA in bankruptcy court, seeking to void the agreement as a fraudulent transfer and asserting successor liability claims. Following a bench trial, the bankruptcy court entered judgment entirely in NVIDIA's favor. *See Brandt v. NVIDIA Corp., et al. (In re 3dfx Interactive, Inc.)*, 389 B.R. 842 (Bankr. N.D. Cal. 2008). The district court affirmed the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

bankruptcy court's judgment, *see Brandt v. NVIDIA Corp. et. al. (In re 3dfx Interactive, Inc.)*, Slip Op., Case No. 08-cv-04634-RMW, (N.D. Cal. Dec. 20, 2010), and the trustee appealed to the Ninth Circuit, *see id.* at Docket No. 37 (Jan. 19, 2011). The Ninth Circuit set oral argument for May 15, 2012. *See* Ninth Circuit Case No. 11-15189, Docket No. 34.

Two weeks before the anticipated appellate argument, the Ninth Circuit *sua sponte* vacated the hearing pending resolution of *Executive Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham)*, No. 11-35162 (9th Cir.). The order characterized the question in *Bellingham* as "whether, or in what circumstances, a bankruptcy court has jurisdiction to enter judgment on a fraudulent conveyance action." *See* Ninth Circuit Case No. 11-15189, Docket No. 37. Shortly after deciding *Bellingham*, the Ninth Circuit directed NVIDIA and the trustee to submit simultaneous supplemental briefs addressing the effect of that decision on the trustee's pending appeal in *Brandt v. NVIDIA*. *See* Ninth Circuit Case No. 11-15189, Docket No. 40. In response, the parties submitted a joint brief advising that "all parties agree that *Bellingham* has no effect on the appeal" in part because "[t]he Trustee's adversary proceeding sought to undo the [asset purchase agreement] as a fraudulent transfer, and so had to be resolved in the course of dealing with NVIDIA's [asset purchase agreement]-related claim against the estate." Ninth Circuit Case No. 11-15189, Docket No. 43 at 2. After receiving the parties' joint submission, the Ninth Circuit reset the matter for oral argument. *See* Ninth Circuit Case No. 11-15189, Docket No. 44.

Before the rescheduled hearing date, this Court granted the petition for a writ of certiorari in *Bellingham*. *See* 570 U.S. __ (2013). The questions presented in the petition are:

> 1. Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.
>
> 2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).

Petitioner and Respondent in their certiorari stage briefs do not question that bankruptcy judges may enter judgment in an action where the defendant has filed a claim in the bankruptcy that cannot be adjudicated without also adjudicating the debtor's action against that creditor.

Nevertheless, in the wake of this Court's decision to grant the petition, the Ninth Circuit again *sua sponte* vacated the hearing date in *Brandt v. NVIDIA* pending a decision in *Bellingham*. *See* Ninth Circuit Case No. 11-15189, Docket No. 47. NVIDIA promptly filed a motion to reinstate the hearing date. NVIDIA emphasized, among other things, that

(i) the petition does not question the power of bankruptcy courts to enter final judgments on claims that must necessarily be decided as part of the claims allowance process and (ii) this Court validated bankruptcy courts' power to enter judgments in those circumstances just two years ago in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). *See id.*, Docket No. 48 at 4 (citing and quoting *Stern*, 131 S. Ct. at 2618). The Ninth Circuit declined to reinstate the hearing. *See id.*, Docket No. 50.

The Ninth Circuit's decisions to vacate the *Brandt v. NVIDIA* hearings suggest that it believes the outcome of this petition might have direct relevance to the power of bankruptcy courts to resolve fraudulent transfer claims against a creditor of the estate even where that claim must necessarily be decided as part of the claims allowance process. As explained below, however, there is no question that bankruptcy courts possess authority to rule on all causes of action that must necessarily be resolved as part of the claims allowance process.

Petitioner does not discuss the power of bankruptcy judges to resolve causes of action that must be decided as part of the claims allowance process. If the Court takes the same silent approach, however, there will be a heightened risk that lower courts might mistakenly interpret the Court's opinion to abrogate that well established power. Accordingly, the Court should state that bankruptcy courts may resolve actions that must necessarily be decided as part of the claims allowance process.

CONSTITUTIONAL AND STATUTORY BACKGROUND

Article III, Section 1 of the United States Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. Art. III, § 1.

Generally, Article III district courts have original and exclusive jurisdiction over cases under the Bankruptcy Code. 28 U.S.C. § 1334(a). In 1984, Congress passed the Bankruptcy Amendments and Federal Judgeship Act, authorizing federal district courts to refer "any or all" bankruptcy cases and proceedings to the district's bankruptcy courts. 28 U.S.C. § 157(a). Bankruptcy courts are units of the district courts, 28 U.S.C. § 151, and bankruptcy judges are appointed for limited terms by the courts of appeals to serve as officers of the district courts, § 152(a)(1). As a result, bankruptcy judges are not Article III judges. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line*, 458 U.S. 50, 61 (1982) ("there is no doubt that the bankruptcy judges created by the Act are not Art. III judges."); *see also*

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50 (1989) (describing bankruptcy court as "a non-Article III tribunal").

Among other things, the Bankruptcy Code contemplates proceedings that resolve creditors' claims against the debtor, to be paid from the estate created under 11 U.S.C. § 541, when the debtor enters bankruptcy. The Code permits a creditor to file a "proof of claim" articulating that creditor's claim against the estate. *See* 11 U.S.C. § 501. "A claim or interest, proof of which is filed ... is deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502.

The Bankruptcy Amendments and Federal Judgeship Act distinguishes between "core" and "non-core" proceedings in bankruptcy court. *See* 28 U.S.C. § 157(b)(3) (requiring bankruptcy judges to determine whether a proceeding is "core."). In making that distinction, Congress empowered bankruptcy judges to "enter appropriate orders and judgments" in "core proceedings arising under" the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(1). Conversely, only district court judges may enter final judgments in "non-core" proceedings related to a bankruptcy case, absent the consent of all the parties. *See* 28 U.S.C. §§ 157(c)(1) and (2).

The "core proceedings" taxonomy stems from *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In holding that Article III prohibited a bankruptcy court from deciding a state-law contract claim against an entity that was not otherwise part of the bankruptcy proceeding, the Court in *Northern Pipeline* differentiated between

the private contract dispute at issue and "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *Id.* at 71-72.

After *Northern Pipeline*, Congress incorporated the "core" terminology into the statutory framework governing bankruptcy judges. *See Executive Benefits Inc. Agency v. Arkison (In re Bellingham)*, 702 F.3d 553, 559 (9th Cir. 2012). In doing so, Congress enumerated sixteen nonexclusive examples of "core proceedings," including "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A), and "allowance or disallowance of claims against the estate," *id.*, § 157(b)(2)(B). Of particular relevance here, Congress declared that "proceedings to determine, avoid, or recover fraudulent conveyances[,]" *id.* § 157(b)(2)(H) are "core proceedings arising under title 11" and thus suitable for resolution by bankruptcy judges. 28 U.S.C. § 157(b)(1).

SUMMARY OF ARGUMENT

I. This Court has repeatedly acknowledged that bankruptcy courts have the power to adjudicate an action against a creditor who filed a proof of claim against the bankruptcy estate where the action must necessarily be resolved as part of the claims allowance process. The bankruptcy courts' authority to enter judgments in those circumstances is well grounded in this Court's precedent and historical practice.

The Court's recent decision in *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011), caps a quintet of Supreme Court decisions—*Katchen v. Landy*, 382 U.S. 323 (1966), *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), *Langenkamp v. Culp*, 498 U.S. 42 (1990), and *Stern* itself—that educe the power of bankruptcy courts to enter final judgment in an action against a creditor, where resolution of that action is a necessary part of the claims allowance process. The rule originates from *Katchen v. Landy*, which first enunciated the Court's view of the power of a bankruptcy court "to allow, disallow and reconsider claims[.]" 382 U.S. at 329 (internal quotations omitted). *Stern* explains the bankruptcy court's power to enter judgment in actions that must necessarily be resolved in the claims allowance process by reference to the debtor's action being, as a practical matter, subsumed in the claims-allowance process. The Court's precedents delineating the scope of bankruptcy court authority uniformly support that principle.

The Court's precedent is consistent with historical practice as well. In 1789 England, bankruptcy was an extrajudicial proceeding assigned to a panel of commissioners who would determine all of the issues arising out of the proceeding, including receiving "proofs of creditors' claims" and "acts of bankruptcy," such as fraudulent transfers, in resolving a creditor's claim. The United States bankruptcy statutes adopted that structure in the first national bankruptcy law in 1800, and have permitted non-

Article III tribunals to enter judgments as part of the claims allowance process ever since.

II. The chief question presented in this petition is whether bankruptcy courts have authority to enter judgments based solely on litigant consent. Neither Petitioner nor Respondent, in their briefs requesting or opposed to certiorari, nor any of the decisions they rely upon to demonstrate a circuit split, contests that bankruptcy judges may enter judgment in an action where the defendant *has* filed a claim in the bankruptcy that cannot be adjudicated without also adjudicating the debtor's action against that creditor. The Court's precedents—culminating with *Stern*—have long established that bankruptcy courts may enter final judgments in those circumstances.

In its underlying opinion, the Ninth Circuit explicitly acknowledged that the bankruptcy court lacked authority to adjudicate Respondent's fraudulent transfer claim because Petitioner had *not* filed a proof of claim. Since the Ninth Circuit applied *Stern* correctly, and no one contests the *Stern* rule on this petition, the resolution of this petition does not implicate the bankruptcy courts' power to enter judgments in actions that must necessarily be decided as part of the claims allowance process.

ARGUMENT

A bankruptcy court enjoys constitutional and statutory authority to adjudicate any action that stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.

Bankruptcy judges are not Article III judges, and so generally may not exercise the power conferred upon federal courts by the Constitution. But this Court has always acknowledged the bankruptcy courts' power to adjudicate any action that must necessarily be resolved as part of the claims allowance process.

I. BANKRUPTCY COURTS MAY RESOLVE ANY CAUSE OF ACTION THAT MUST BE DECIDED AS PART OF THE CLAIMS ALLOWANCE PROCESS

This Court has long held, consistent with historical practice, that a bankruptcy judge has authority to adjudicate claims against the bankrupt's estate as well as any other actions that must necessarily be decided as part of that claims allowance process.

A. This Court Has Repeatedly Explained That Bankruptcy Courts May Resolve Causes Of Actions That Are A Necessary Part Of The Claims Allowance Process

In *Stern v. Marshall*, the Court detailed the power of bankruptcy courts. Chief Justice Roberts, writing for the Court, explained that a bankruptcy court's power turns on "*whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process*," 131 S. Ct. at 2618 (emphasis added). Where, as in *Stern*, the action did not stem from the bankruptcy itself or would not necessarily be resolved in the claims allowance process, a bankruptcy court is constitutionally prohibited by Article III from entering final judgment. *See id.* at 2620. Where, on the other

hand, an action does stem from the bankruptcy process or must necessarily be resolved in the claims allowance process, a bankruptcy court enjoys the power to enter final judgment in any action. *See Onkyo Europe Elecs. GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) ("It is crystal clear that the bankruptcy court had constitutional jurisdiction under *Stern* to adjudicate whether the sale [at issue] was a fraudulent transfer, because 'it was not possible to rule on [the] proof of claim without first resolving' the fraudulent transfer issue.") (citing and quoting *Stern*, 131 S. Ct. 2616).

Stern is the most recent in a line of Supreme Court cases that recognize the power of bankruptcy courts to enter final judgment in an action against a creditor where resolution of that action is a necessary part of the claims allowance process. In *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438 (1901), the Court interpreted the Bankruptcy Act of 1898, and concluded that a proceeding disallowing a creditor's claim against the estate unless he repaid a preference was not a "suit" triable only in an Article III court. *See id.* at 456.[2]

The Court applied that reasoning 65 years later in *Katchen*. *See Katchen*, 382 U.S. at 332 n.9 ("We

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[2] Preference actions allow a trustee in bankruptcy to avoid a transfer of an interest in the debtor's property to a creditor made within a certain time period before the debtor filed its bankruptcy petition if the transfer enables the creditor to receive more than it would have as part of its pro rata share of the bankruptcy estate. *See generally* 11 U.S.C. § 547.

apply that reasoning in our opinion today and hold that determination of objections to claims, whether or not affirmative relief is decreed, does not constitute adjudication of a suit by the trustee[.]") *Katchen* held that bankruptcy courts may enter judgment in preference actions asserted and proved by a bankruptcy trustee "in response to a claim filed by the creditor who received the preferences." 382 U.S. at 325. That conclusion rested on the Court's view of the *power* of a bankruptcy court "to allow, disallow and reconsider claims," which, it added, is "of basic importance in the administration of a bankruptcy estate." *Id.* at 329 (internal quotations omitted). The Court elaborated:

> This power to allow or disallow claims includes *full power to inquire into the validity of any alleged debt or obligation of the bankrupt* upon which a demand or a claim against the estate is based. This is essential to the performance of the duties imposed on it. The trustee is enjoined to examine all claims and to present his objections, and *[w]hen objections are made, [the court] is duty bound to pass on them*. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res, and thus falls within the principle ... that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession.

Id. at 329-30 (emphases added; internal quotations omitted).

Katchen notes that if bankruptcy courts have the power to do anything, it is the power to enter judgments as part of the claims allowance process. The Court was entirely untroubled by Congress assigning power to the bankruptcy courts to pass on objections to a creditor's proof of claim, but took the analysis one important step further. Although the Bankruptcy Act in effect at the time did not expressly empower bankruptcy courts to order the surrender of a preference, *see Katchen*, 382 U.S. at 328, the Court nevertheless held that the bankruptcy court had authority to order affirmative relief on the debtor's preference counterclaim. The bankruptcy court enjoyed that power, the Court explained, because it "*must necessarily* determine the amount of [the] preference" in passing on the objection to the creditor's claim. *See id.* at 333-34 (emphasis added).

The Court reiterated this principle in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* That decision squarely addressed Article III limitations on the power of bankruptcy courts after *Katchen*. The Court held that a bankruptcy court violated Article III by adjudicating a debtor's breach of contract action against a third party that "was not otherwise part of the bankruptcy proceedings." 458 U.S. at 53. The defendant's non-creditor status was dispositive. Absent a proof of claim, the debtor's contract claim could not involve the restructuring of creditor-debtor relations "at the core of the federal bankruptcy power." *Id.* at 71. The bankruptcy court therefore lacked authority to adjudicate the claim.

Later, in *Granfinanciera, S.A. v. Nordberg*, the defendant's status as a non-claimant against the es-

tate was again dispositive of the Court's conclusion that the defendant retained his Seventh Amendment right to have a trustee's fraudulent transfer claim tried by jury. 492 U.S. at 58 ("a creditor's right to a jury trial . . . depends on whether the creditor has submitted a claim against the estate[.]"). The Court equated the Article III and Seventh Amendment analyses, and emphasized that *because* the petitioners had not filed claims against the estate, the trustee's claim was one "to augment the bankruptcy estate" rather than part of "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. The claim therefore "d[id] not arise as part of the process of allowance and disallowance of claims" and was not integral to the restructuring of the debtor-creditor relationship. *Id.* at 58. "As a consequence" of the distinction between debtors' claims that augment the estate and creditors' claims to a pro rata share of the res, the Court in *Stern* held that claims against noncreditors of the estate must be adjudicated in an Article III court, 131 S. Ct. at 2614, while claims that must necessarily be resolved as part of the claims allowance process may be adjudicated in bankruptcy courts, *id.* at 2618.

Last, *Langenkamp v. Culp*, 496 U.S. 42 (1990), simply applied the rule of *Katchen* to conclude that a defendant in a preference action were not entitled to a jury trial where they had submitted claims against the estate.

The Court's precedents, culminating two years ago in *Stern*, therefore establish a settled rule authorizing bankruptcy courts to enter final judgments in actions by a debtor against a creditor that must

necessarily be decided as part of the claims allowance process. *Stern* explains *Katchen* and its progeny in part by reference to the debtor's action being, as a practical matter, subsumed in the claims-allowance process. *See Waldman v. Stone*, 698 F.3d 910, 920-21 (6th Cir. 2012). Where it is "not possible for the [court] to rule on the creditor's proof of claim without first resolving the voidable [transfer] issue," *Stern*, 131 S. Ct. 2616, the transfer issue becomes part of the process of allowing or disallowing claims, and there is "no basis for the creditor to insist that the issue be resolved in an Article III court," *id.* Put differently, bankruptcy courts have the power to adjudicate a debtor's action where that action "become[s] integral to the restructuring of the debtor-creditor relationship," *Langenkamp*, 498 U.S. at 44, "which is at the core of the federal bankruptcy power," *Northern Pipeline*, 458 U.S. at 71. Once the bankruptcy court resolves the claim, there is nothing left to be decided on the debtor's claim. The bankruptcy court's resolution of the contested claim against the estate is res judicata, and so subsumes and disposes of the debtor's claim as well. *Katchen*, 382 U.S. at 333-35; *see also Stern*, 131 S. Ct. at 2617. Under those circumstances, bankruptcy courts may adjudicate a debtor's affirmative claim against a creditor without offending Article III by virtue of their power to enter judgments as part of the claims allowance process.

Reflecting the clarity of this Court's opinions, the lower courts are united in their view that bankruptcy courts may resolve actions that must necessarily be decided as part of the claims allowance process. *See, e.g.*, *Bellingham*, 702 F.3d at 564 (observing

that the "dispositive distinction" between cases affirming bankruptcy court authority and cases rejecting such authority is whether the claim necessarily has to be resolved in deciding whether to allow a defendant's claim on the estate); *Waldman v. Stone*, 698 F.3d 910, 921 (6th Cir. 2012) ("for a bankruptcy court to enter final judgment as to claims that seek an award of money damages to the estate, there must have been, at the outset of the claims-disallowance process, 'reason to believe that the process of adjudicating [the] proof of claim would necessarily resolve' the damages claim.") (citing *Stern*, 131 S. Ct. at 2617); *Onkyo Europe Elecs. GMBH v. Global Technications Inc. (In re Global Technovations Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) (holding that it was "crystal clear that the bankruptcy court had constitutional jurisdiction under *Stern* to adjudicate whether the sale of [an asset] was a fraudulent transfer" because "it was not possible ... to rule on [the creditor's] proof of claim without first resolving the fraudulent transfer issue.") (quoting *Stern*, 131 S. Ct. at 2616); *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 914 (7th Cir. 2011) ("Non-Article III judges may hear cases when the claim arises 'as part of the process of allowance and disallowance of claims'") (quoting *Stern*, 131 S. Ct. at 2616).

B. Historical Practice Confirms That Bankruptcy Courts May Resolve Causes Of Actions That Are A Necessary Part Of The Claims Allowance Process

The Court's precedent delineating the power of the bankruptcy courts is consistent with historical practice.

Historically, bankruptcy proceedings in England were assigned by the Lord Chancellor to a panel of commissioners to determine all of the issues arising out of the proceeding. *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L. J. 567, 575-82, 587 (1998) ("Bankruptcy Judges"). The commissioners received "proofs of creditors' claims" for the purpose of "deciding the creditors' eligibility to file a petition and for distributing the assets of the bankrupt to creditors," *id.* at 587, and also considered related administrative issues and "acts of bankruptcy," such as fraudulent transfer claims, in resolving a creditor's claim, *id.* at 581-82 ("One of the important acts of bankruptcy was fraudulently conveying one's property" and "the commissioners ... decided whether the alleged bankrupt ... had committed acts of bankruptcy."). *See also* Andrew M. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy 100 Comm. L. J.* 191, 202 (citing Richard Burn, 1 *The Justice of the Peace, and Parish Officer* 192 (Richard Burn., 19th ed. 1800)). The bankruptcy commissioners therefore could adjudicate fraudulent transfer claims in the course of receiving proofs of claims and distributing the bankrupt's assets. *See, e.g.*, *Wood v. Owings*, 5 U.S.

239 (1803) (addressing fraudulent transfer claim that originated with a commission in bankruptcy).

By utilizing commissions, the bankruptcy claims allowance process differed from the adjudicatory structure of the law courts. The bankruptcy claims process was not a "suit" tried by the common law courts at Westminster in 1789. *See Stern*, 131 S. Ct. at 2609 ("When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III Courts.") (citing *Northern Pipeline Constr.*, 458 U.S. at 90.). Sir William Blackstone described the bankruptcy commissions as an "extrajudicial method of proceeding, which is allowed merely for the benefit of commerce."[3] William Blackstone, *The Student's Blackstone: Selections from the Commentaries on the Laws of England* 352 (Robert Malcom Kerr, ed., London, Albemarle St. 1858).

Section 2 of the Bankruptcy Act of 1800—the first federal bankruptcy statute enacted here—adopted the commissioner structure from England. *See* Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); J. Adriance Bush, *The National Bankruptcy*

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[3] Commissioners were appointed on a case-by-case basis, were lawyers, not judges, were removable at will by the Lord Chancellor or by a vote of the creditors themselves, and did not have the judicial immunity of judges of the courts of record. *See* Plank, *Bankruptcy Judges*, *supra* at 576, 579-80 & n.57 (citing Thomas Davies, *The Laws Relating to Bankrupts* 165 (London, Henry Linton 1744)); Duncan, *Modern American Bankruptcy*, *supra* at 206.

Act of 1898, with Notes, Procedure and Forms 11 (The Banks Law Publishing Co., N.Y. 1899) (The 1800 Act "represent[ed] the exact stage that the legislation of the English Parliament on the subject had reached at the date of its passage[.]"). Commissioners were appointed as a matter of course during that time. *See* Vern Countryman, *A History of American Bankruptcy Law*, 81 Com. L. J. 226, 228-29 (1997) (describing bankruptcy proceedings under the Bankruptcy Act of 1800 as occurring before bankruptcy commissions); *see also Lingan v. Bayley*, 1. D.C. 112 (1 Cranch 1802) (Circuit court noting the matter originated in a bankruptcy commission).

The Bankruptcy Act of 1841 also provided for the appointment of commissioners to receive proof of debts and carry out other administrative duties related to bankruptcy cases. *See* Act of Aug. 19, 1841, ch. 9, 5 Stat, 440, § 7 (repealed 1843) ("all proof of debts or other claims, by creditors entitled to prove the same by this act ... before such court *or commissioner appointed thereby* ....") (emphasis added). Similarly, the Bankruptcy Act of 1867, 14 Stat. 517, allowed non-Article III "registers in bankruptcy" to assist in a wide range of tasks related to bankruptcy, including "proof of debts." *See* Clinton Rice, *Manual of the U.S. Bankruptcy Act*, 1867, 35-36 (Philp & Solomons, Washington, D.C. 1867). Under the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, the "registers" were renamed "referees," and were included in the definition of "court." *Id.* at § 1(7) and § 2(2) (repealed 1978) (permitting referees to "[a]llow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates[.]"). The Bankruptcy Act of 1938,

52 Stat. 840, likewise provided for bankruptcy referees, who could adjudicate petitions referred to them. *See* Bankruptcy Act, ch. 575, 52 Stat. 840 §§ 1(9), 61(ff) (repealed 1978).

C. The Ninth Circuit Should Not Have Vacated The *Brandt v. NVIDIA* Hearings

Brandt v. NVIDIA falls squarely within the rule drawn from *Katchen*, *Langenkamp*, and *Stern*. NVIDIA filed a proof of claim against the bankruptcy estate based on the debtor's breach of contract. The trustee responded by alleging that the same contract was voidable because it had effected a fraudulent transfer. The bankruptcy court could not rule on NVIDIA's proof of claim without first resolving whether the underlying contract constituted a voidable transfer. Because the trustee's fraudulent transfer claim necessarily had to be resolved as part of the process of allowing or disallowing NVIDIA's claim, it is "crystal clear" under *Stern* that the bankruptcy court enjoyed authority to enter judgment for NVIDIA. *Onkyo*, 694 F.3d at 722 (citing *Stern*, 131 S. Ct. at 2616).

II. THE SCOPE OF ANY BANKRUPTCY COURT AUTHORITY THAT IS BASED ON LITIGANT CONSENT IS DISTINCT FROM AUTHORITY THAT IS NECESSARY TO RESOLVE THE CLAIMS ALLOWANCE PROCESS

The Court has not previously opined whether litigants may consent to a bankruptcy courts' entry of a final judgment on claims otherwise reserved to Arti-

cle III courts. In the decision below, the Ninth Circuit explicitly acknowledged that the bankruptcy court lacked authority to adjudicate Respondent's fraudulent transfer claim because Petitioner had not filed a proof of claim:

> In this case, EBIA is a noncreditor to the BIA bankruptcy estate. Hence, it is not subject to the bankruptcy court's equitable jurisdiction; the trustee can recover monies fraudulently conveyed to it only by initiating a legal action. That legal action need not necessarily have been resolved in the course of allowing or disallowing the claims against the BIA estate. For that reason, the claim belonged in an Article III court.

Bellingham, 702 F.3d at 564-65 (citations omitted). The Ninth Circuit nevertheless held that the bankruptcy court enjoyed authority to adjudicate the trustee's fraudulent transfer claim because the litigants had consented. *See id.* at 568 ("EBIA impliedly consented to the bankruptcy judge's authority.").

Accordingly, the chief question presented in this petition is whether bankruptcy courts have authority to enter judgments based solely on litigant consent. Petitioner answers the question "no," and is supported by a decision of the United States Court of Appeals for the Sixth Circuit. *See Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012). *See also Wellness Int'l Network Ltd. v. Sharif*, __ F.3d __, No. 12-1349, 2013 WL 4441926, at *17-18 (7th Cir. Aug. 21, 2013). Re-

spondent argues for broader bankruptcy powers, supported by the decision below.

Neither Petitioner nor Respondent, in their briefs requesting or opposed to certiorari, nor any of the decisions they rely upon to demonstrate a circuit split, contests that bankruptcy judges may enter judgment in an action where the defendant *has* filed a claim in the bankruptcy that cannot be adjudicated without also adjudicating the debtor's action against that creditor. Petitioner does not contest that rule in its merits brief either, and nor will Respondent, who seeks *broader* bankruptcy court authority.

As discussed above, the Court's precedents—culminating with *Stern*—have long established that bankruptcy courts may enter final judgments in debtors' actions against creditors of the estate where those actions must necessarily be resolved as part of the claims allowance process. The Court in *Katchen* distinguished that power from the question of litigant consent presented here:

> We ... hold that determination of objections to claims, whether or not affirmative relief is decreed, does not constitute adjudication of a suit by the trustee, and thus it is not necessary to ascertain whether the creditor has 'consented' to such determination .... Rather, our decision is governed by the traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that pro-

> cedure. As this is the basis of our decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on the objections to the claim.

Katchen, 382 U.S. at 332 n.9. (internal quotations omitted)

In sum, regardless of the resolution of the question presented by this petition, bankruptcy courts will have the power to enter judgments in actions that must necessarily be decided as part of the claims allowance process.

CONCLUSION

For the foregoing reasons, the Court should once again make clear that bankruptcy judges have the constitutional and statutory authority to resolve all causes of action that must be resolved as part of the claims allowance process.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, TRUSTEE,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF IRVING H. PICARD, AS TRUSTEE OF THE SUBSTANTIVELY CONSOLIDATED ESTATE OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC AND BERNARD L. MADOFF, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Writ of Certiorari Should Be Dismissed Because EBIA Lacks the Requisite Personal Stake in This Appeal 4

II. The Avoidance Action Here Is Integral to the Bankruptcy and Therefore Was Properly Before the Bankruptcy Court 14

III. The Court Should Avoid or Minimize the Consequences of Reversing the Decision Below 28

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Allen v. Am. Fed'n of Gov't Employees AFL-CIO, 276 F. App'x 197 (3d Cir. 2008) 13

Arizonans for Official English v. Arizona, 520 U.S. 43 (1996) 4, 13, 14

Camreta v. Greene, 131 S. Ct. 2020 (2011) 9

Caspari v. Bohlen, 510 U.S. 383 (1994) 15

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991) 13

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 5, 8, 11

Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) 14

Estate of Connors v. O'Connor, 6 F.3d 656 (9th Cir. 1993) 14

Focus Inv. Assocs., Inc. v. Am. Title Ins. Co., 992 F.2d 1231 (1st Cir. 1993) 8

Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) 8

Granfinanciera, S.A., v. Nordberg, 492 U.S. 33 (1989) 3, 14, 26, 27, 31

Hobbs v. Hull, 1 Cox 445, 29 Eng. Rep. 1242 (1788) 23

In re Madoff Securities, 490 B.R. 46 (S.D.N.Y. Jan. 4, 2013) 29

In re Madoff Securities, 1:12-mc-00115-JSR (S.D.N.Y. Feb. 12, 2013) 29

Katchen v. Landy, 382 U.S. 323 (1966) ..... *passim*

Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277 (2012) 15

Langenkamp v. Kulp, 498 U.S. 42 (1990) ..... *passim*

Lewis v. Casey, 518 U.S. 343 (1996) 8, 11

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 10

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Schor v. CFTC, 478 U.S. 833 (1986) 19

Stern v. Marshall, 131 S. Ct. 2594 (2011) ..... *passim*

Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) 8

United States v. Harris, 106 U.S. 629 (1883) 15

U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 13

Warth v. Seldin, 422 U.S. 490 (1975) 12

Constitutional and Statutory Provisions

U.S. Const. art. I, § 8, cl. 4 ..... *passim*

11 U.S.C. § 548 ..... 6, 18

11 U.S.C. § 544 19

2 Stat. 19 (1800) 24, 25

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INTEREST OF THE *AMICUS CURIAE*[1]

In his capacity as Trustee of the substantively consolidated estate of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, Irving H. Picard is responsible for recovering as much as possible of the nearly $20 billion in investor principal lost in the world's largest-ever Ponzi scheme, for distribution to Madoff's customers on a *pro rata* basis. To that end, Mr. Picard has filed over one thousand actions to avoid fraudulent or preferential transfers, most against Madoff investors who, by luck or otherwise, came out ahead when his fraud unraveled, at the direct expense of their fellow investors. The *amicus curiae's* interest in the orderly and efficient operation of the bankruptcy system, particularly its avoidance provisions, is plain: the sooner he can avoid and recover Madoff's wrongful transfers, the sooner he can provide relief to Madoff's victims.

A decision that removes avoidance actions from the bankruptcy courts would impair that interest by fundamentally altering the division of labor between bankruptcy courts and the district courts. It would essentially bifurcate every complex bankruptcy proceeding (and many non-complex ones), placing initial

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

responsibility for the recovery of assets in one tribunal and their distribution in another, even in cases where the two turn on overlapping sets of facts and evidence. History and experience have necessarily treated the recovery and distribution of assets in bankruptcy as two sides of the same coin. There is no reason now to upset that settled practice—particularly in a case where the Petitioner in fact received plenary Article III adjudication and has no current injury.

SUMMARY OF THE ARGUMENT

The Court presumably granted certiorari in this case because it was the first to raise several issues left open in the wake of its decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). But timing isn't everything. Those issues, due to the way that they are raised in this case, are not susceptible to judgment at this point under Article III's "case" or "controversy" requirement. The Petitioner here, Executive Benefits Insurance Agency ("EBIA"), already received any relief to which it might be entitled in mounting its defense under *Stern*, depriving it of standing to argue those issues here.

But if the Court does reach the merits of this abstract dispute, it should not follow EBIA's lead in simply assuming that Congress's assignment of avoidance actions to bankruptcy courts for adjudication in the first instance violates the Constitution. Greater respect than that is owed to a coordinate branch of the Government, and the issue is nowhere

near so clear-cut as EBIA would have it. Neither *Stern* nor any of the Court's other precedents, including *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989), resolved that issue, and EBIA flat-out ignores language in *Stern* and other cases indicating that avoidance actions are different in kind from other claims that might be brought in connection with a bankruptcy.

Whereas common law claims and the like merely seek to augment a bankruptcy estate and have traditionally been heard in courts of law, avoidance actions are integral to bankruptcy, the mirror image of the claims-allowance process that the Court has always recognized may be overseen by a non-Article III tribunal. Historical evidence demonstrates beyond any reasonable doubt that Congress's Bankruptcy Clause power also authorizes it to assign such actions to non-Article III bankruptcy courts, in the same way that English law assigned them to non-judicial "commissions" for centuries prior to the Framing—a practice adopted in the first United States bankruptcy law in 1800. To hold or just assume that this practice is unconstitutional would break sharply with historical understanding of the scope of the Bankruptcy Clause power, depriving Congress of a narrow but important authority that does not intrude at all on the exclusive domain of Article III courts.

Finally, while the Court may not have expected the chaos that resulted from its decision in *Stern*, it must be aware that a decision for EBIA in this case

threatens even worse. The parties in this case do not raise the central issue that has vexed courts following *Stern*: the constitutional limits on bankruptcy court jurisdiction. Rather than address that issue, EBIA asks the Court to amplify the consequences for when lower courts get it wrong. The predictable result will be to channel tens of thousands of cases into already overburdened district courts, imposing delays and litigation burdens that are incompatible with the purposes of any sound bankruptcy regime. That should be reason enough for the Court to hesitate in reaching the merits here. But if the Court does do so, and if it reverses the decision below, it should take care to affirm the vitality of its decisions in *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Kulp*, 498 U.S. 42 (1990) (per curiam), so as to avoid causing entirely predictable but unnecessary injury to parties already injured by insolvency and fraud.

ARGUMENT

I. The Writ of Certiorari Should Be Dismissed Because EBIA Lacks the Requisite Personal Stake in This Appeal

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1996). So should the Court here. EBIA already received the sole relief that it seeks in this appeal: vindication of its asserted "Article III

right to adjudication by a district judge" of the Respondent Trustee's fraudulent transfer claims against it. Pet. at 9; *see also* Pet. at 18; Pet. Br. at 43. Accordingly, this appeal presents no "proper case or controversy," and the Court has "no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

A. Although the relevant procedural history of this case is neither lengthy nor complex, EBIA unaccountably gives short shrift to the proceedings before the district court. *See* Pet. Br. at 9. Significantly, that court measured the Trustee's motion for summary judgment, EBIA's response, and the parties' supporting papers against the standard set forth in Fed. R. Civ. P. 56, finding that EBIA failed to establish any genuine dispute of material fact and that the Trustee was entitled to judgment as a matter of law.

While EBIA contends that the district court applied "a 'substantial evidence' standard in reviewing the bankruptcy court's findings," Pet. Br. at 9, the court's order itself demonstrates otherwise. To begin with, this is how the court described its task:

> Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that, "under the

> governing substantive law . . . could affect the outcome of the case." When reviewing the record, all "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986)). However, self-serving declarations that lack detailed facts or supporting evidence are insufficient to raise a genuine issue of material fact.

Pet. App. 45a (some citations omitted). This should look familiar: it is the same standard enunciated in this Court's 1986 summary judgment trilogy and properly applied by any district court considering a motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

No less compelling is the district court's application of that standard. At issue were the Trustee's claims under the Bankruptcy Code to avoid fraudulent transfers allegedly made by the debtor, "BIA," to its affiliate, "ARIS," and EBIA. Following a recitation of the case's background rich with citations of the parties' evidence, Pet. App. 41a-44a, the court methodically ticked off the statutory elements and supporting facts for each claim. Here, for example, is the court's analysis of the Trustee's avoidance claim under 11 U.S.C. § 548:

> First, the transfers of items of value from BIA to EBIA were made within one year of the bankruptcy action. The transfers oc-

> curred in February 2006 and the bankruptcy was filed in June 2006. Second, BIA was insolvent on the date of the transfers. Third, the evidence shows that commissions owed to BIA were routed through Peter Pearce, into ARIS's joint account that was shared with EBIA. The accounting spreadsheet for ARIS showed that after BIA ceased to operate, Pearce deposited the BIA commissions into the ARIS account, which was shared with EBIA. ARIS is entirely owned by Marjorie Ewing, who is not only the wife of [former BIA CEO] Paleveda, but also became the CEO of BIA after EBIA was created. Indeed, there was little distinction between ARIS and BIA, with employees splitting time between the two companies and yet receiving one pay check for work done for both companies. Appellant attempts to controvert these facts with a self-serving statement from Defendant Paleveda that he did "not know whether Peter Pearce deposited any of his commissions into the ARIS accounts" and that "[i]f this is true, it is a clerical error." This conjecture does not controvert the accounting records that show the transactions moved BIA's accounts receivable to EBIA at the expense of BIA's creditors.

Pet. App. 46a-47a (citations omitted).

The district court's order is precisely what it appears to be and the very thing that EBIA claims it

was denied: adjudication by an Article III district court applying the Rule 56 standard. Three days later, that court entered judgment, from which EBIA appealed.

B. Having actually received the consideration that it now asserts it was denied, EBIA lacks any injury and therefore lacks standing to raise its Article III defense.

Standing, of course, "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, a plaintiff "must demonstrate standing for each claim he seeks to press" and therefore "must demonstrate standing separately for each form of relief sought." *DaimlerChrysler*, 547 U.S. at 352 (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)). So while EBIA surely has standing to contest the merit of the Trustee's avoidance claims—as it did before moving the Ninth Circuit in light of *Stern* to vacate the judgment below and remand *for trial*—it must also support its defense that it was wrongfully denied access to an Article III court, such that this Court could act to remedy its resulting injury.[2] *Cf. Parr v. United States*,

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[2] A party must have standing to raise a defense. *See, e.g., Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 n.26 (1985) (holding that religious foundation had standing to raise free exercise defense to Fair Labor Standards Act claims); *Focus Inv. Assocs., Inc. v. Am. Title Ins. Co.*, 992 F.2d 1231, 1241 (1st Cir. 1993) ("[T]he defense of usury is personal to the borrower or one in privity with the borrower, and unavailable to strangers to the usurious transaction.").

351 U.S. 513, 516 (1956) ("Only one injured by the judgment sought to be reviewed can appeal . . . ."); *see generally Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (prevailing officials may challenge a ruling that their conduct violated the Constitution only because "the judgment may have prospective effect on [them]").

And yet EBIA fails to identify any injury that it suffered as a result of what it contends was an illegitimate interlude in bankruptcy court. EBIA's claim is that the bankruptcy court lacked authority to enter judgment. Even assuming that EBIA is correct on that score, what difference does it make? EBIA does not claim that initial entry of judgment by the bankruptcy court, as opposed to the district court, caused any collateral consequence at all. For example, unlike in *Stern*, nothing here turns upon the date on which final judgment was entered. *See Stern*, 131 S. Ct. at 2602-03. EBIA also does not claim that the district court was unable to exercise the full discretion of a court of first instance. Instead, it only insinuates that the district may not have acted in that fashion because it may have deferred to the judgment of the bankruptcy court in some unspecified fashion, Pet. Br. at 9—an unsupported and unsupportable claim that is demonstrably at odds with the district court's consideration of the evidence and application of the law.[3] Far from "concrete," this im-

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[3] And if the gravamen of EBIA's complaint is merely that the district court misapplied the Rule 56 standard and should not

aginary harm does not even rise to the level of "speculative." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A hypothetical example illustrates the point. Imagine that a district court judge's law clerk comes to the realization, while the judge is away from chambers for a long weekend, that he can decide the cases just as well as his boss and proceeds to issue an "order" under his own signature dismissing an action. The judge, immediately upon her return, decides the case for herself, entering an order of dismissal. The plaintiff, of course, has suffered no injury because the law clerk's "order" imposed no consequences on him. On that basis, no federal court could entertain the plaintiff's claim challenging the authority of law clerks to decide cases; if the plaintiff were to raise such a claim in a motion for reconsideration, the district court judge would be right to deny it for lack of standing.

So too here. Even if the bankruptcy court's "judgment" was without legal weight or authority, EBIA has no basis to complain that it was denied any part of the attention of an Article III judge that it claims was due, because the district court did not defer in

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have granted summary judgment, that contention may be—and has been—addressed by the court of appeals, Pet. App. 34a-37a, without implicating the weighty issues that EBIA asks this Court to resolve.

any respect to the bankruptcy court's "judgment."[4] Had EBIA bothered to raise its Article III defense before the district court, the district court would have had to deny it for lack of injury and therefore lack of standing.

Because EBIA was never injured, no remedy is possible, either. In any standing inquiry, "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U.S. at 357. The Court applied that rule in *DaimlerChrysler*, finding that taxpayers' status as *municipal* taxpayers did not confer on them standing to challenge a *state* franchise tax credit. 547 U.S. at 353. Even if the taxpayers could establish injury with respect to their municipal taxes, the Court concluded, "that injury does not entitle them to seek a remedy as to the state taxes." *Id.*

EBIA attempts a similar sleight-of-hand. Quite understandably, it would like to put behind it its failure to adduce any evidence in opposition to summary judgment beyond a "self-serving" affidavit and to have its case set for trial.[5] *See* Pet. App. 49a, 44a,

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[4] Again, even if the district court erred in applying the Rule 56 standard, that error should be resolved, as in any other case, in a routine appeal contesting that point. *See supra* n.3.

[5] To be clear, that was in fact the relief that EBIA sought from the Ninth Circuit, that "the court [] vacate the judgment and remand for trial." Motion to vacate the Judgment of the Bankruptcy Court for Lack of Jurisdiction over the subject matter under F.R.C.P. 12(b)(1), at 2, *The 412(i) Co. a/k/a Bellingham*

47a. But its standing to dispute the merits of the avoidance claims against it does not entitle it to seek another shot at Article III adjudication, as if the first one never happened, and certainly does not entitle it to avoid ordinary summary judgment practice and go straight to trial. Instead, any remedy must be limited to redressing an "inadequacy" that EBIA actually suffered—at most, correction of some error in the merits of the district court's judgment, which the Ninth Circuit has already upheld and which EBIA does not challenge here. Pet. App. 34a-37a. At this point, no relief is possible.

In sum, with respect to its Article III defense, EBIA lacks "such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quotation marks omitted). While the issue of a bankruptcy court's authority might be resolved in a suitable case, this is not it.

C. Even had EBIA suffered some injury by the bankruptcy court's entry of judgment, the district court's subsequent *de novo* review of the judgment completely remedied that injury, rendering EBIA's Article III defense moot.

Ins. Agency, Inc. v. Executive Benefits Ins. Agency, Inc., No. 11-35162 (9th Cir. filed July 22, 2011).

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English*, 520 U.S. at 67 (quotation marks omitted). Thus, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, (1980) (quoting Henry Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)).

That interest is lacking here, for the reasons described above. EBIA received complete relief for any possible claim that it was denied its due Article III adjudication when the district court ruled on the Trustee's summary-judgment motion and entered judgment. EBIA's defense is therefore moot.

There is nothing unusual in that result. This Court, for example, concluded in *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991), that arrestees' claims that they had been denied prompt judicial determinations of probable cause "have since been rendered moot" because "they either received probable cause determinations or were released." Only the fact that the case was brought as a class action allowed it nonetheless to continue. *Id.* That basis to avoid mootness is unavailable here. *See also Allen v. Am. Fed'n of Gov't Employees AFL-CIO*, 276 F. App'x 197, 198 n.1 (3d Cir. 2008) (district court denied as moot plaintiff's "motion for only Article III judges to

be assigned to his case"); *Estate of Connors v. O'Connor*, 6 F.3d 656, 659 (9th Cir. 1993) (magistrate's unauthorized award of attorney's fees "was cured by the district court's later de novo review of the magistrate's findings and conclusions").

Nor may EBIA take advantage of the exception to mootness for disputes capable of repetition, but evading review. That exception applies only where "there is a reasonable expectation that *the same complaining party* will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (emphasis added and quotation marks omitted). EBIA surely does not concede that it intends to undertake the same or a similar course of action as the one that made it the target of a successful fraudulent transfer action.

Having already received precisely and entirely what it seeks in mounting its Article III defense, EBIA lacks a "still vital claim for prospective relief." *Arizonans for Official English*, 520 U.S. at 67. That requisite interest lacking, the writ of certiorari should be dismissed.

II. The Avoidance Action Here Is Integral to the Bankruptcy and Therefore Was Properly Before the Bankruptcy Court

EBIA asks the Court to simply assume the answer to the weighty question pointedly left open by *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33, 50, 64 (1989): whether Congress may authorize bankruptcy courts to preside over fraudulent transfer actions

subject to review in, or withdrawal by, the district courts. Simply assuming that a portion of the Bankruptcy Code's jurisdictional reach is unconstitutional, without actually reasoning through the matter, would not only be deeply disrespectful to a coordinate branch, but also would be deeply mistaken. Indeed, *Stern* itself supports what history and experience also recognize: actions to avoid fraudulent and preferential transfers are no less central to the Bankruptcy Clause power than the claims-allowance process, which the Court has long held amenable to adjudication in bankruptcy. *See* 131 S. Ct. at 2618. There is no meaningful constitutional distinction between the fraudulent transfer claims at issue here and the adjudication of creditors' claims on the bankruptcy estate.[6]

A. EBIA's two arguments, regarding consent and bankruptcy courts' statutory authority to submit proposed findings of facts and conclusion of law, rest on the assumption that Article III of the Constitution precludes Congress from assigning proceedings

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[6] This Court absolutely may address a question "predicate to the resolution of the question presented in the petition," *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994), and (if it reaches the merits at all) should do so here out of "[p]roper respect for a coordinate branch of the government." *United States v. Harris*, 106 U.S. 629, 635 (1883). *See also Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2296 n.9 (2012) (addressing antecedent question of whether an opt-out regime is permitted for payment of union agency fees where petitioner challenged the circumstances under which a state may deduct such fees from employees' wages under an opt-out regime).

over the fraudulent transfer claims against it to non-Article III bankruptcy courts. *See* Pet. Br. at (I) ("Questions Presented"). Without at all arguing the point, EBLA simply asserts that this case implicates "the constitutional defect in the Bankruptcy Code that this Court identified in *Stern*." Pet. Br. at 16. It does not.

Stern held that Article III prevented Congress from assigning to a bankruptcy court "authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. At issue was a state common law tort claim, for tortious interference with a gift. *Id.* at 2601. That claim could not be resolved by a bankruptcy court, the Court explained, because it was "a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id.* at 2611.

The Court identified several factors relevant to that characterization. First, the claim was "one under state common law between two private parties" that "does not depend on the will of congress." *Id.* at 2614 (quotation marks omitted). Second, the claimant's "claimed right to relief does not flow from a federal statutory scheme." *Id.* And third, "the asserted authority to decide [the] claim is not limited to a particularized area of the law." *Id.* at 2614 (quotation marks omitted). Resolution of such a claim, the Court concluded, therefore "involves the most proto-

typical exercise of judicial power" and so could not be assigned to a non-Article III tribunal. *Id.* at 2615.

To reach that conclusion, the Court specifically rejected the claimant's reliance on two prior cases that approved bankruptcy jurisdiction over avoidance actions. *Katchen v. Landy*, 382 U.S. 323 (1966), had "permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as 'summary jurisdiction' over a voidable preference claim" against a creditor. *Stern*, 131 S. Ct. at 2616. Similarly, *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (per curiam), approved a bankruptcy court's resolution of a preferential transfer claim against a creditor. These cases, the Court explained, were distinguishable on two bases, the first being that, in each case, the bankruptcy court's adjudication of the creditor's claim on the estate would necessarily resolve the avoidance action. 131 S. Ct. at 2617.

The second, however, concerned the nature of the actions, distinguishing avoidance claims in bankruptcy from other claims among private parties:

> In both *Katchen* and *Langenkam* . . . the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U.S.C. § 547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U.S., at 43, 111

> S. Ct. 330; *see, e.g.*, § 547(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor"). In *Katchen*, "the Trustee asserted that the payments made to the creditor were preferences inhibited by Section 60a of the Bankruptcy Act." [This] claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

Id. at 2618 (alterations and some citations omitted). As the Court concluded, the proper inquiry "is *whether the action at issue stems from the bankruptcy itself* or would necessarily be resolved in the claims allowance process." *Id.* (emphasis added).

EBIA's assumption that *Stern's* holding applies to the avoidance actions against it ignores this inquiry and ignores *Stern's* indication that at least some avoidance actions, when central to the resolution of an estate in bankruptcy, are creatures of federal bankruptcy law and therefore not subject to *Stern's* holding. *Stern's* factors indicate that the claims at issue here are such claims. First, they are not state common law claims, but instead "depend on the will of Congress," which addressed avoidance actions pursuant to its Bankruptcy Clause power. *See* 11 U.S.C. § 548 (directly authorizing a bankruptcy trustee to avoid fraudulent transfers, purely as a matter

of federal law); § 544 (incorporating state avoidance actions to apply in bankruptcy proceedings).[7] As described below, avoidance actions are different from all other claims that seek merely to augment the estate because they address conduct that is itself an "act of bankruptcy" and directly concern the structure of debtor-creditor relations. *See infra* § II.B. Second, unlike in *Stern*, the claimed right to relief flows directly from a federal statutory scheme, authority for which is expressly committed to Congress. U.S. Const. art. I, § 8, cl. 4. And third, the necessary jurisdiction to decide such claims is narrow and particularized, having been handled by non-Article III bankruptcy-specific tribunals for over a century without intruding on the core authority of Article III courts.

In sum, under *Stern's* factors, the claims at issue here are ones that are integral to "a specific and limited federal regulatory scheme," and bankruptcy jurisdiction over them "is limited to that which is necessary to make the reparations procedure workable." *Schor v. CFTC*, 478 U.S. 833, 856 (1986). Accordingly, the bankruptcy court's exercise of jurisdiction in this case did not encroach on Article III.

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[7] That Congress chose to incorporate state avoidance actions into federal bankruptcy law is of no moment, given that, under its Bankruptcy Clause power, Congress could clearly preempt the application of those state laws to transfers by debtors in bankruptcy.

B. That conclusion is consistent with the historical practice of bankruptcy. This history and original public understanding of the Bankruptcy Clause power provide no meaningful constitutional basis to distinguish core fraudulent transfer claims from the bankruptcy court-supervised process of allowing and disallowing claims on the bankruptcy estate. This makes sense: as a logical matter, avoidance actions and the claims process are two sides of the same coin, each concerning the claims of third parties on the *res* of the estate. The only difference is timing. Between two creditors with identical claims, the one that manages to collect on the day before the bankruptcy filing may be subject to an avoidance action, while the one who presents his claim the day after seeks allowance and payment from the estate. There is no good reason to treat those proceedings differently when both identically involve the restructuring of debtor-creditor relations and nothing more. This distinguishes the bulk of avoidance actions from other claims involving private rights, such as that in *Stern*.

Avoidance is as central to bankruptcy as the claims-allowance process, and it always has been. From the 1570 enactment of the Statute of Elizabeth—the model for all subsequent bankruptcy legislation—bankruptcy and avoidance have been inextricably intertwined. *See* Charles Tabb, The History of Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 7-8 (1995). That statute recognized as an "act of bankruptcy"—*i.e.*, the predicate

to being declared a bankrupt—the transfer of assets not "due for money delivered, wares sold, or any other just or lawful course, or good consideration or purposes . . . to the intent or purpose to defraud or hinder any of his or her creditors." 13 Eliz. 1, c. 7, § 1 (1570). Creditors so defrauded could petition the Lord Chancellor to convene a bankruptcy proceeding, presided over by "commissioners." *Id.* § 2.

Those commissioners—who were not judges but "wise and honest" persons, *id.* § 2—exercised almost absolute authority over the case:

> The commissioners had substantial powers, originally somewhat akin to a combination of today's trustee and bankruptcy judge. In addition to the normal trustee-like activities of collecting, liquidating, and distributing the debtor's property to creditors, commissioners could seize property, summon persons to appear before them, and commit people to prison.

Tabb, *supra*, at 8. Thus, commissioners decided all bankruptcy-related claims in the first instance, with their actions subject to review by appeal or collateral attack. Thomas Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L.J. 567, 576-77 (1998) (appeal was by petition to the Lord Chancellor, who "would either resolve the issue or refer the matter to one of the common law courts") (footnotes omitted).

In particular, commissioners' authority extended to the investigation, seizure, and assignment of assets wrongfully transferred by the bankrupt to third parties. Commissioners were empowered to summon such transferees (under penalty of imprisonment) and examine them under oath. 13 Eliz. 1, c. 7, § 5. If, in the commissioners' view, a party failed to "declare the plain and whole truth" concerning any assets that he had received from the bankrupt, they could levy a penalty of "double the value of all such goods, chattels, wares, merchandizes, and debts, by them or any of them so concealed." *Id.* § 5. And if a third party declined to hand over any fraudulently transferred assets, the commissioners could levy those assets in the same manner. *Id.* at § 6.

These provisions were continued and clarified by later enactments. The 1603 bankruptcy statute made it an "act of bankruptcy" for any person to "make or cause to be made any fraudulent grant or conveyance of his, her, or their lands, tenement, goods, or chattels, to the intent or whereby his, her, or their creditors . . . shall or may be defeated or delayed for the recovery of their just and true debt." 1 Jac. 1, c. 15 § 1 (1603). Under King George II, preferential transfers were also made an act of bankruptcy, recoverable in the same manner as fraudulent transfers. *See* Francis Regis Noel, A History of the Bankruptcy Law 29-30 (1919) (discussing Bankrupts Act, 5 Geo. 2, c. 30 (1731)). Throughout, the fundamental practice point was that third parties levying fraudulent or preferential transfers were

made to "forfeit double the value of the goods . . . to be levied by the commissioners on his or their lands and goods, &c., for the benefit of the creditors, in the same manner as they may order the lands or goods of the bankrupt himself." 2 John Comyns, A Digest of the Laws of England 120 (5th ed. 1822). Creditors, too, could bring fraudulent transfer actions, and their claims were heard in either courts of law or equity. *See Hobbs v. Hull*, 1 Cox 445, 445-446, 29 Eng. Rep. 1242, 1242 (1788) ("Courts of Equity have most certainly been in the habit of exercising a concurrent jurisdiction with the Courts of Law on the statutes of Elizabeth respecting fraudulent conveyances.").

These same practices were adopted—often using identical language—by the American colonies. For example, Pennsylvania's 1785 "Act for the Regulation of Bankruptcy" defined fraudulent transfer as an act of bankruptcy and provided that, "if a transfer at any time previously had been made with the intent to defraud the creditors, it was in the power of the commissioners 'to sell or dispose thereof in as ample manner as if the bankrupt had been actually seized thereof.'" Noel, *supra*, at 63 (quoting statute).

Well familiar with English practice, "[t]he framers of the United States Constitution had the English bankruptcy system in mind when they included the power to enact 'uniform laws on the subject of bankruptcies' in the Article I powers of the legislative branch." Tabb, *supra*, at 6. They recognized that the English system, which defined the practice of bankruptcy, could not operate on a state-by-state basis.

The Framers' purpose was to provide federal authority to enact such a system and thereby "prevent so many frauds where the parties or their property lie or be removed into different States." *The Federalist No. 42* (James Madison).

Unsurprisingly, the "first United States bankruptcy law, passed in 1800, virtually copied the existing English law," as filtered through the Pennsylvania statute. Tabb, *supra*, at 6-7, 14. Like English law, that Act recognized as an act of bankruptcy any action, "with intent unlawfully to delay or defraud his or her creditors, . . . [to] secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make, or cause to be made, any fraudulent conveyance of his or her lands, or chattels." An Act to establish an uniform System of Bankruptcy throughout the United States, 2 Stat. 19, 21, § 1 (1800).

Also like the English system, the 1800 Act was administered by non-judge commissioners appointed by the district court, *Id.* at 21-22, § 2, exercising "powers very similar to the English commissioners." Tabb, *supra*, at 14. And identical to the English system, commissioners had the authority to summon recipients of improper transfers, examine them, and commit them to prison upon the commissioners' view that they had failed to "declare the whole truth." 2 Stat. at 25, § 14. Moreover, the commissioners could require such parties to "forfeit double the value of all the property, goods, chattels, and debts, by them concealed." *Id.* Finally, with respect to fraudulent

conveyances, the Act also provided that "the commissioners shall have power to assign the same, in as effectual a manner as if the bankrupt had been actually seised or possessed thereof." 2 Stat. at 26, § 17.

What this historical practice tells us is that "the details of the initial bankruptcy adjudication are essentially a matter for legislative discretion, so long as the subject matter of the adjudication is within the 'subject of Bankruptcies' under the Constitution." Plank, *supra*, at 611. The imperative of Article III is fully satisfied by judicial supervision of bankruptcy proceedings through appeal or collateral attack, just as the law provides today.

Yet EBIA asks the Court to assume that the English practices that practically *defined* "laws on the subject of bankruptcies" for the Framing generation are actually barred by the Constitution. And it asks the Court to assume that the early Congress that carried over same those practices into federal law was profoundly mistaken as to the extent of its power. But there is no basis for either assumption in history or the constitutional text. To the contrary, "[t]he practice of bankruptcy adjudication in England, Pennsylvania, and the United States before and shortly after the adoption of the Constitution establishes that non-Article III judges may as a general matter initially adjudicate bankruptcy issues under Article III of the Constitution" as an exercise of Congress's Bankruptcy Clause power. Plank, *supra*, at 610. If the Court reaches the merits in this case, it

should address Congress's authority under the Bankruptcy Clause to place core avoidance actions in specialized tribunals, rather than simply assume that Congress exceeded its authority by legislating consistent with all historical practice.

C. The Court's decision in *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989), does not undermine this point, for two reasons.

First, the claim at issue in that case was not in any manner integral to the bankruptcy proceeding. As the Court then recounted, the "fraudulent conveyance action was not filed until well *after* the Bankruptcy Court had approved the plan of reorganization and [the debtor's] tangible assets and business had been liquidated." *Id.* at 60 n.15. Although brought by a trustee, the avoidance action otherwise had nothing to do with the bankruptcy proceeding, being more in the nature of a suit by a creditors' representative, undertaken long after the requisite nexus to insolvency had dissipated. *See* Thomas Plank, The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 491-92 (1996) ("Under the Bankruptcy Clause, Congress may only enact legislation that regulates the relationship between an insolvent debtor and her creditors."). On that basis, the Court was right to conclude that the action was not "integral to the restructuring of debtor-creditor relations." 492 U.S. at 58.

By contrast, the claims at issue here are absolutely integral to an ongoing bankruptcy proceeding and the concomitant restructuring of debtor-creditor re-

lations. The Trustee alleges, and has demonstrated to the satisfaction of three separate tribunals, that EBIA looted the debtor's assets in a scheme specifically undertaken to defraud its creditors. *See* Pet. App. 6a. This was, in the historical sense, an "act of bankruptcy," and its resolution is central to the ongoing liquidation of the estate. For those reasons, the Trustee's avoidance actions are integral to the bankruptcy. Assigning those actions to a non-Article III tribunal is a proper exercise of Congress's Bankruptcy Clause power, as historically understood and exercised.

Second, *Granfinanciera* only considered the application of the "public rights" framework to bankruptcy, rather than the scope of Congress's Bankruptcy Clause power. It is certainly less than obvious that even core bankruptcy functions, such as the determination of creditors' claims, concern *public* rights, when the parties involved are, as here, *private* entities. Indeed, the Court itself has cast doubt on the application of the "public rights" framework to bankruptcy proceedings, without suggesting that, contrary to historical practice, all such proceedings must be assigned to an Article III tribunal. *See, e.g., Stern*, 131 S. Ct. at 2614 n.7; *Granfinanciera*, 492 U.S. at 56 n.11 ("We do not suggest that the restructuring of debtor-creditor relations is in fact a public right.").

The "public rights" framework most comfortably fits disputes where the federal government is involved in its sovereign capacity, *see Granfinanciera*, 492 U.S. at 65-66 (Scalia, J., concurring) (citing cas-

es). The historical practice of placing initial adjudication of bankruptcy disputes in non-judicial tribunals may be *sui generis*, depending not on the application of Article III (*i.e.*, on whether "public rights" are involved) but instead on the scope of Congress's Bankruptcy Clause power. *See supra* § II.B; *cf. Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) ("Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate . . . . "). Before the Court rejects the longstanding constitutional practice of assigning certain bankruptcy-related claims to bankruptcy-specific tribunals and strikes down an act of Congress (whether directly or by implication), it should at least consider that possibility.

III. The Court Should Avoid or Minimize the Consequences of Reversing the Decision Below

This Court should be aware of the dislocation and harm that a decision for EBIA would cause. If the widespread confusion that followed *Stern* is any indication, the consequences of a decision that strips bankruptcy courts of any authority to preside over fraudulent transfer actions such as the ones here would be severe. As fairly possible, the Court should strive to avoid that result. But if it is unavoidable, the Court should, at the least, be clear about the limits of its ruling and the vitality of its other precedents in this area, particularly *Katchen* and *Langenkamp*.

A. The Court's expectation that its decision in *Stern* was a "'narrow' one" that did not "meaningfully change[] the division of labor in the current statute" was undermined by the failure to make clear its limits. 131 S. Ct. at 2620. In fact, *Stern* "sent shockwaves through the entire bankruptcy community." Jolene Tanner, Stern v. Marshall: The Earthquake that Hit the Bankruptcy Courts and the Aftershocks that Followed, 45 Loy. L.A. L. Rev. 587, 588 (2012). And it has led precisely to what its dissenters warned would occur: a "game of jurisdictional ping-pong between courts [that] lead[s] to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy." *Id.* at 2630 (Breyer, J., dissenting).

This has, unfortunately, been the *amicus curiae's* direct experience. Over two years after the Court's decision in *Stern*, the issue of bankruptcy court authority continues to be litigated in the adversary actions that he has brought against parties that facilitated and/or profited from Bernard Madoff's fraud. *See, e.g., In re Madoff Securities*, 490 B.R. 46, 51-55 (S.D.N.Y. Jan. 4, 2013) (Rakoff, J.) (holding that *Stern* generally deprives the bankruptcy court of jurisdiction over certain avoidance actions); *In re Madoff Securities*, 1:12-mc-00115-JSR (S.D.N.Y. Feb. 12, 2013) (Rakoff, J.) ("bottom-line" order holding that, due to operation of 11 U.S.C. § 502(d), *Stern* does not deprive the bankruptcy court of authority to rule on other avoidance actions). That delay has consequences for Madoff's victims, who are the benefi-

ciaries of all funds that the *amicus curiae* is able to recover.

B. This case threatens even worse consequences, in several respects. To begin with, a decision for EBIA will only exacerbate the uncertainty that followed *Stern*. Since that decision, "courts across the country have been struggling to understand when a bankruptcy court may enter a final judgment, and when it may not do so." David Leta, Stern v. Marshall Changes the Landscape of Bankruptcy Court Adjudication, 26 Utah B.J. 34, 34 (March/April 2013); *see id.* at 37 (discussing cases). But the parties here inexplicably do not ask the Court to provide further guidance on that point. *See* Pet. at (I); BIO at i. Instead, EBIA requests that the court amplify the consequences for when lower courts get it wrong, while the Trustee requests only that the Court not do so. In EBIA's view, if a bankruptcy court improperly adjudicates a claim, neither party consent nor *de novo* review by a district court can cure the error. If that view is accepted, the result will be to channel the initial adjudication of claims into the district courts, so as to avoid the risk of having to start over from scratch even after one or more rounds of litigation.

Of course, Congress had good reason to seek to channel the large volume of bankruptcy claims *away* from the district courts:

> A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to

> eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . . [T]he jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation . . . ."

Granfinanciera, 492 U.S. at 75 n.4 (White, J., dissenting) (quoting S. Rep. No. 95-989, at 17 (1978)).

Assigning such core matters as actions to avoid preferential and fraudulent transfers to the district courts for initial determination "is problematic for two reasons: (1) the district courts already have overcrowded dockets; and (2) many times district courts lack the necessary familiarity with the Bankruptcy Code." Tanner, *supra*, at 608 (footnote omitted). As to the former, "the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases." *Stern*, 121 S. Ct. at 2630 (Breyer, J., dissenting) (citing 2010 statistics). In 2011, more than 75,000 adversary proceedings were filed in the bankruptcy courts.[8] Assigning all of those matters to dis-

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[8] Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Adversary Proceedings Commenced, Terminated, and Pending Under the Bankruptcy Code During the 12-Month Periods Ending September 30, 2011 and 2012 (2012), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F08Sep12.pdf

trict courts would increase their caseloads by more than 25 percent, at a time when civil actions already linger on district court dockets for years—for example, the median time from filing to trial in the Western District of Washington (where the instant case was brought) is 17.2 months.[9] And that compares favorably to many other districts, where the wait-times exceed two years. Such delays are fundamentally incompatible with the orderly resolution of a bankrupt estate *for the benefit of its creditors*.

As to familiarity, bankruptcy practice is highly specialized, with emphasis on practicality, compromise, and speed, as necessary to carry out the purposes of bankruptcy. Bankruptcy judges, selected on the basis of merit, tend to combine a deep, intuitive understanding of the Code and bankruptcy procedure that allows them to act quickly and decisively, consistent with the needs of debtors, creditors, and others affected by insolvency. While their mode of adjudication may be the same, district court judges are less likely to possess the intuition, born of years' experience in bankruptcy practice, that facilitates successful reorganization and liquidation.

For these reasons, "[p]lacing fraudulent transfer claims into the same bucket as purely state law

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[9] Administrative Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile (2013). http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf&page=76

claims, like those at issue in *Northern Pipeline* and *Stern*, is a realignment more significant than *Stern* implied." Tyson Crist, Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts, 86 Am. Bankr. L.J. 627, 683 (2012). Doing so will have tangible, negative consequences for the efficiency and effectiveness of the bankruptcy system. In many cases, such as those brought by the *amicus curiae*, it will compound the injury to individuals who have already been victimized by financial fraud, without providing any commensurate benefit—in terms of due process rights or other aspects of fairness—to defendants of avoidance actions.

C. These consequences should be avoided, and the easiest way to do so would be to dismiss this case and wait for an appropriate vehicle to clarify *Stern's* holding. In the alternative, for the reasons stated above and in the Respondent Trustee's brief, the Court should affirm the decision of the Ninth Circuit. But if the Court does reach the merits, and if it does reverse the decision below, it has a responsibility to minimize unnecessary displacement by providing appropriate guidance to the lower courts and bar.

At the least, this requires affirming the vitality of the Court's precedents in *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Kulp*, 498 U.S. 42 (1990) (per curiam). The Court has never cast doubt on bankruptcy courts' authority to oversee the claims-allowance process. And when a creditor is met, in turn, with a preference action from the trus-

tee, that action becomes part of the claims-allowance process which is triable only in equity." *Langenkamp*, 489 U.S. at 44. That is because the action is "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Id.*

Nothing in *Stern* calls that holding into doubt—to the contrary, *Stern* carefully distinguished both cases, 131 S. Ct. at 2616-18—and nothing in this case calls for that holding to be narrowed or overruled. But if the Court is inclined to accept the Ninth Circuit's view that *Stern's* holding applies to fraudulent transfer actions generally, *see* Pet. App. 23a, it should confirm that the longstanding exception for counterclaims resolved in the process of the claims-allowance process is still good law. Clarity on this point would reduce, somewhat, the uncertainty and confusion that would surely follow a decision in EBIA's favor.

CONCLUSION

The Court should dismiss the writ of certiorari as improvidently granted. But if the Court reaches the merits, it should affirm the decision of the Ninth Circuit.

Respectfully submitted,

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NOVEMBER 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
PETITIONER,

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ROBERT R. MCCORMICK FOUNDATION AND THE CANTIGNY FOUNDATION AS *AMICI CURIAE* SUPPORTING THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. A Bankruptcy Judge Has No Statutory Authority To Submit Proposed Findings And Conclusions In An Action By A Bankruptcy Trustee To Avoid Alleged Fraudulent Transfers To Non-Creditors. 4

II. Empowering A Bankruptcy Judge To Preside Over Pretrial Matters In Fraudulent Transfer Cases Would Disserve The Interests Of Judicial Economy And The Fair And Orderly Administration Of Civil Justice. 11

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

Deutsche Bank Trust Company Americas v. Olson Enters.,
No. 11-03754 (N.D. Ill.) 2

Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency),
702 F.3d 553 (9th Cir. 2012) 5-7

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 4, 11

In re Tribune Company Fraudulent Conveyance Litigation,
No. 11 MD 2296, No. 12 MC 2296 (S.D.N.Y.)..... 2

Kirschner v. FitzSimons, et al.,
No. 12 CV 2652 (S.D.N.Y.) 2

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 10

Peterson v. Somers Dublin Ltd.,
Nos. 12–2463, 12–2464, 12–2493, 12–2494, 12–2495, 2013 WL 4767495 (7th Cir. Sept. 6, 2013) (Easterbrook, J.) 10

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 10

Stern v. Marshall,
131 S.Ct. 2594 (2011) .....*passim*

Waldman v. Stone,
698 F.3d 910 (6th Cir. 2012) 8

Weisfelner v. Morgan Stanley & Co. (In re Lyondell Chemical Co.),
Adv. Pro. No. 10-04609 (Bankr. S.D.N.Y.) 2

Wellness Int'l Network Ltd. v. Sharif,
No. 12-1349, 2013 WL 4441926 (7th Cir. Aug. 21, 2013) 7, 13

STATE CASES

Niese v. ABN AMRO,
No. 2011 L 005723 (Ill. Cir. Ct. Cook Cnty.) 2

FEDERAL STATUTES

11 U.S.C. § 546(e) 10

28 U.S.C. § 157 7-9

28 U.S.C. § 157(b)(1) 9

28 U.S.C. § 157(b)(2) 6

28 U.S.C. § 157(b)(2)(C) 8

28 U.S.C. § 157(c) 6

28 U.S.C. § 157(c)(1) 6

28 U.S.C. § 157(c)(2) 7

28 U.S.C. § 157(e) 13

28 U.S.C. § 636 12

28 U.S.C. § 636(b)(1)(A) 12

28 U.S.C. § 1334 2

28 U.S.C. § 1407 2

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae The Robert R. McCormick Foundation (the "McCormick Foundation") is one of the nation's largest philanthropic organizations. Formed originally as a charitable trust following the death of Colonel McCormick in 1955, the McCormick Foundation has awarded grants totaling more than $1 billion to support programs promoting early childhood education and care, civic learning and engagement, veterans training and employment, and other salutary goals. *Amicus curiae* Cantigny Foundation is a charitable organization that serves as the steward of Cantigny Park, a 500-acre park, and maintains and manages the Cantigny First (Infantry) Division Museum and the Robert R. McCormick Museum.

The McCormick Foundation and Cantigny Foundation (together, the "Foundations"), are among more than three thousand former public shareholders of Tribune Company ("Tribune") who have been sued by creditors of Tribune to avoid, as fraudulent transfers, payments totaling approximately $8 billion that Tribune made to shareholders to effectuate Tribune's leveraged buyout in 2007. The Foundations are named as

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

defendants in three of 54 such lawsuits, all of which have been consolidated for coordinated pretrial proceedings in the Southern District of New York ("Tribune LBO Litigation").[2] The Foundations were among the largest shareholders of Tribune and have a commensurate stake in the outcome of the Tribune LBO Litigation. *In re Tribune Company Fraudulent Conveyance Litigation*, No. 11 MD 2296, No. 12 MC 2296 (S.D.N.Y.) (Sullivan, R.).

The case before this Court involves only two parties and modest sums. This Court's decision, however, may impact the Tribune LBO litigation, which, as noted, involves billions of dollars paid to thousands of public shareholders six years ago, and other massive and complex fraudulent transfer litigation, now pending in the bankruptcy court in the Southern District of New York. *Weisfelner v.*

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[2] One of the three suits, *Kirschner v. FitzSimons, et al.*, No. 12 CV 2652 (S.D.N.Y.), was originally brought as an adversary proceeding by the Official Committee of Unsecured Creditors of Tribune Company in the Bankruptcy Court for the District of Delaware, where Tribune's chapter 11 bankruptcy case was brought. That case is now being prosecuted by the trustee of a litigation trust formed under Tribune's confirmed plan of reorganization. The plaintiffs in the other two cases, *Deutsche Bank Trust Company Americas v. Olson Enters.*, No. 11-03754 (N.D. Ill.) and *Niese v. ABN AMRO*, No. 2011 L 005723 (Ill. Cir. Ct. Cook Cnty.), are groups of Tribune note holders and retirees, respectively, who in 2011 brought dozens of lawsuits against Tribune shareholders in a variety of state and federal courts across the nation. The state court cases were removed to U.S. district court, chiefly pursuant to 28 U.S.C. § 1334, and all of the cases, state and federal, were then transferred to the Southern District of New York for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Tribune Company Fraudulent Conveyance Litigation*, No. 11 MC 2296, No. 12 MC 2296 (S.D.N.Y.) (Sullivan, J.).

Morgan Stanley & Co. (In re Lyondell Chemical Co.), Adv. Pro. No. 10-04609 (Bankr. S.D.N.Y.). The Foundations believe that all aspects of the case before this Court should be determined in the U.S. district court. The bankruptcy court has no proper role to play in this litigation.

It is of grave interest to the Foundations and others similarly interested that their cases be resolved in a manner and in a forum that raise no issues of constitutional or congressional authorization or competence.

SUMMARY OF ARGUMENT

The Bankruptcy Code does not authorize a bankruptcy judge to submit proposed findings of fact and conclusions of law to a district judge for final decision in a core proceeding. Proposed findings and conclusions are allowed only in non-core matters. Here, the Ninth Circuit incorrectly construed the Bankruptcy Code's allocation of power to a bankruptcy judge to "hear and determine" core proceedings as encompassing the power to issue proposed findings and conclusions. The Ninth Circuit's decision cannot be squared with the plain language of the Bankruptcy Code, which starkly distinguishes the role of bankruptcy judges in core and non-core matters and carefully allocates the responsibility of district judges and bankruptcy judges in each. Whether bankruptcy judges are to play a role in core matters that must be adjudicated in the district court, implicates important policy choices that are for Congress, not the courts, to make that determination. District judges, with the assistance of magistrate judges as necessary, are

perfectly well-qualified to preside over core proceedings, as they do in a large variety of other complex matters. The involvement of bankruptcy judges in core proceedings pending before district judges would disserve the interests of sound judicial administration because it would add delay, expense and confusion to the proceeding with no offsetting benefit in the fairness or accuracy of the result.

ARGUMENT

I. A Bankruptcy Judge Has No Statutory Authority To Submit Proposed Findings And Conclusions In An Action By A Bankruptcy Trustee To Avoid Alleged Fraudulent Transfers To Non-Creditors.

Actions by a bankruptcy trustee to avoid alleged fraudulent transfers to a non-creditor implicate private, not public, rights. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Such actions are "quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56.

Because an avoidance action by a bankruptcy trustee against a non-creditor is an action to enforce a private right, it is subject to two constitutional limitations. First, the case must be adjudicated in an Article III court, by a judge with lifetime tenure whose salary Congress may not diminish. *Stern v. Marshall*, 131 S.Ct. 2594, 2611-14 (2011); *Granfinanciera*, 492 U.S. at 51. Second, the

non-creditor defendant is entitled to a jury trial under the Seventh Amendment. These constitutional consequences flow whether the trustee has sued under state law, as in *Stern*, or under the Bankruptcy Code, as in *Granfinanciera*. *See generally Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553 (9th Cir. Dec. 4, 2012).

In the case before this Court, the Ninth Circuit correctly applied *Stern* and *Granfinanciera* in holding that the trustee's state and federal law claims to set aside pre-petition transfers from the debtor to a successor entity that had not filed a claim against the debtor's estate could not be adjudicated outside of an Article III court, at least absent the consent of the transferee. *Bellingham*, 702 F.3d at 565.[3] That non-controversial aspect of the Ninth Circuit's ruling is not before the Court.

The Ninth Circuit also opined, however, that even though a fraudulent conveyance suit by a trustee against a non-creditor must be decided by an Article III judge, a bankruptcy judge, whose appointment is for a limited term and whose salary is not constitutionally protected, may nevertheless hear the case in the first instance and propose findings of fact and conclusions of law to a district judge for *de novo* consideration. *Id.* at 566. The

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[3] The Foundations take no position as to the first two issues presented for this Court's review—whether a constitutional objection to a bankruptcy court's determination of a core proceeding involving private rights may be waived and, if so, whether waiver may be implied from the facts of this case.

Ninth Circuit anomalously based its decision on Section 157(c)(1) of the Judicial Code, which delimits the authority of bankruptcy judges in *"non-core"* proceedings:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected. 28 U.S.C. § 157(c)(1).

The Ninth Circuit acknowledged (*Bellingham*, 702 F.3d at 565) that an action by a bankruptcy trustee to avoid an alleged fraudulent transfer is a "core" proceeding, not a "non-core" proceeding, and therefore lies outside the scope of Section 157(c). *See* 28 U.S.C. § 157(b)(2) ("'Core' proceedings include, but are not limited to . . . (H) proceedings to determine, avoid or recover fraudulent conveyances . . . .") The Ninth Circuit also acknowledged (*Bellingham*, 702 F.3d at 565) that while the Judicial Code expressly authorizes bankruptcy judges to "hear and determine" core proceedings—a grant of authority this Court limited on constitutional grounds in *Stern*

v. Marshall—nowhere does it authorize a bankruptcy judge in a core proceeding, unlike in a non-core proceeding, to submit proposed findings and conclusions to a district judge for final decision. In an evident non-sequitur, however, the Ninth Circuit nevertheless reasoned that the power to "hear and determine" a core proceeding "surely encompasses" the power to hear the case and propose findings of fact and conclusions of law to the district court. *Bellingham*, 702 F.3d at 565. Otherwise, the Ninth Circuit continued, bankruptcy judges would be "impotent to address fraudulent conveyance cases," which would "fall in[to] the interstices" of the Judicial Code. *Id.*

The Ninth Circuit's reasoning is unsound and its conclusion should be rejected. Section 157 sharply distinguishes the respective roles of bankruptcy judges and district court judges in core and non-core proceedings (except by consent of all parties under Section 157(c)(2)). Core proceedings are to be heard and determined by a bankruptcy judge, subject to *de novo* review in the district court. Non-core proceedings may be heard by a bankruptcy judge but must be decided by a district judge. Non-core proceedings do not overlap core proceedings, and the bankruptcy court's authority to act in the former does not extend to the latter. The Seventh Circuit made this point clearly and succinctly in its very recent opinion in *Wellness Int'l Network Ltd. v. Sharif*, No. 12-1349, 2013 WL 4441926 (7th Cir. Aug. 21, 2013),

> No statutory provision authorizes a bankruptcy court to propose

> findings of fact and conclusions of law in a core proceeding; such a report and recommendation from the bankruptcy court is statutorily authorized only in noncore proceedings, *see* [Section] 157(c)(1).

While allowing a bankruptcy judge to propose findings and conclusions may appear to be a "practical remedy" in some cases, the Judicial Code does not expressly permit it. *Waldman v. Stone*, 698 F.3d 910, 921 (6th Cir. 2012).

Section 157 thus presents "[t]wo options," core and non-core, each of which conclusively determines "[t]he manner in which a bankruptcy judge may act on" the matter. *Stern*, 131 S.Ct. at 2604-05. In *Stern*, Pierce Marshall argued that even though Vicki Marshall's counterclaim for defamation was a core proceeding under Section 157(b)(2)(C), it was not one that the bankruptcy court could "hear and determine" because it merely "related to" rather than "arose in" Vicki Marshall's bankruptcy. This Court rejected that argument, holding that Section 157 did not recognize a category of core proceeding that was merely "related to" a case under title 11 and thus outside the scope of cases Section 157 authorizes bankruptcy judges to "hear and determine." *Stern*, 131 S.Ct. at 2604. A bankruptcy proceeding is either core, and thus subject to adjudication by a bankruptcy judge subject to traditional appellate review by the district court, or non-core, and thus one in which the bankruptcy judge may propose findings of fact and conclusions of law for the district court's *de novo* consideration. *Id.* To the argument

that Section 157 also recognizes a third type of proceeding—that is, a proceeding that qualifies as core but may be treated as non-core—this Court responded emphatically "[N]o such category exists." *Id.*

Here, the effect of the Ninth Circuit's decision is to create precisely the type of bankruptcy proceeding that this Court declared in *Stern* does not exist: one defined as core but administered and adjudicated as non-core. The Ninth Circuit proposed this new hybrid procedure to plug what it perceived as the statutory "gap" created by *Stern*, in which, contrary to Section 157(b)(1), core proceedings involving private rights can no longer be decided in bankruptcy court. But, of course, the "interstices" the Ninth Circuit conjured are entirely imaginary: core proceedings before district judges would be addressed in just the way district judges administer the other cases on their docket, both simple and complex. Courts do not have the authority to improvise such procedural devices *ad lib*. Such innovations are for Congress, and it is not at all clear whether, when[4] or how Congress might decide to plug the "gap" that so troubled the Ninth Circuit.

Congress created the core/non-core distinction, and defined the responsibilities of the bankruptcy court and the district court with respect to each, expecting that nearly all core bankruptcy proceedings would be heard and determined by

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[4] The full impact of *Stern v. Marshall*—including the range of core proceedings that must be heard in a district court and Stern's application to cases by a trustee against a debtor's creditors—may take years to unfold.

bankruptcy judges. If, as a result of *Stern*, the tide of bankruptcy litigation shifts toward the district court and away from the bankruptcy court, Congress may respond in any number of ways. The Ninth Circuit's (and Solicitor General's) jury-rigged, extemporized invention ignores the institutional and policy implications that Congress must weigh in assigning responsibility for the administration of these cases. The bankruptcy courts may, for instance, be seen as having an understandable, even laudable predilection for bringing as many assets as possible into the bankrupt's estate to be distributed to the estate's creditors. Congress, however, may be more concerned with the implications for the competing policy—salient in the cases alleging fraudulent transfers arising out of LBOs but not implicated in the case now before the Court—of protecting the stability of security markets, a policy it expressed so emphatically in section 546(e) of the Bankruptcy Code. *See generally Peterson v. Somers Dublin Ltd.*, Nos. 12–2463, 12–2464, 12–2493, 12–2494, 12–2495, 2013 WL 4767495 (7th Cir. Sept. 6, 2013) (Easterbrook, J.). Courts have no authority to anticipate how Congress might rework the Bankruptcy Code nor to implement extra-statutory stopgaps in the meantime. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

II. Empowering A Bankruptcy Judge To Preside Over Pretrial Matters In Fraudulent Transfer Cases Would Disserve The Interests Of Judicial Economy And The Fair And Orderly Administration Of Civil Justice.

The types of core proceedings that under *Stern* must be determined in an Article III court are those least likely to benefit from the participation of a bankruptcy judge. In *Stern*, the claim that was outside the bankruptcy judge's constitutional authority to decide was a claim for defamation. In *Granfinanciera*, it was a claim for fraudulent conveyance. Both cases thus involved private rights historically enforced in courts of law rather than claims cognizable in equity or admiralty or claims by a government agency to enforce a statute or regulation. In neither case would the specialized training and experience of a bankruptcy judge, as opposed to a district judge, lead to the fairer and more efficient administration of civil justice.

To the extent that a district judge presiding over a core proceeding might benefit from preliminary fact-finding or non-binding decision-making by a subordinate judicial officer, the district judge is free to call upon a magistrate judge for that purpose, just as in any other civil case within the court's jurisdiction. Not only may magistrate judges issue reports and recommendations on case-dispositive questions of law and fact, they may "hear and determine" other pretrial matters, subject to reconsideration by the district judge only where the magistrate judge's order is "clearly erroneous or

contrary to law." 28 U.S.C. § 636(b)(1)(A). Magistrate judges routinely serve as special masters, resolve discovery disputes, and preside over a variety of pretrial and post-trial matters. There is no role a bankruptcy judge could perform in cases requiring the exercise of federal judicial power that district judges do not already assign, frequently and confidently, to magistrate judges.

Perhaps the greatest contribution magistrate judges routinely make to the orderly administration of complex, multiparty litigation is in overseeing pretrial discovery. But while the authority of magistrate judges to exercise near plenary authority over discovery issues is clear and well-established, *see generally* 28 U.S.C. § 636, the authority of a bankruptcy judge to exercise any control whatsoever over the discovery process in a fraudulent transfer case or other core proceeding requiring an Article III judge is highly suspect:

> There is no statutory provision authorizing a bankruptcy court to preside over discovery, apart from its statutory authority over core and non-core matters. It is true that magistrate judges often preside over pretrial matters such as discovery, even if the district court ultimately decides the claim for which discovery is sought, but 28 U.S.C. § 636(b)(1)(A) expressly authorizes a district judge to "designate a magistrate judge to hear and determine any pretrial

> matter pending before the court," with certain exceptions and subject to reconsideration by the district judge if "the magistrate judge's order is clearly erroneous or contrary to law." No analogous statutory authorization exists for bankruptcy judges.

Wellness Int'l Network Ltd., No. 12-1349, 2013 WL 4441926.

The involvement of a bankruptcy judge in a core proceeding justiciable in an Article III court would be particularly inappropriate and superfluous where the case is triable to a jury. Bankruptcy judges have no statutory authority to conduct jury trials absent consent of the parties, *see* 28 U.S.C. § 157(e)—and perhaps no constitutional authority even in those cases—and few bankruptcy judges have likely ever conducted a jury trial through judgment. Where the case is to be tried to a jury, proposed findings and conclusions by a bankruptcy judge would be wasteful and moot.

In short, there is no role for a bankruptcy judge in a fraudulent transfer case or other core proceeding justiciable only in an Article III court. The involvement of a bankruptcy judge in such cases would only add confusion, expense and delay with no countervailing enhancement to the fairness or accuracy of the result.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF OF THE *TOUSA* LIQUIDATION TRUSTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. BANKRUPTCY COURTS HAVE CONSTITUTIONAL AUTHORITY TO ENTER FINAL JUDGMENT ON FRAUDULENT TRANSFER CLAIMS WITH THE CONSENT OF THE PARTIES 9

A. A Long Line Of This Court's Decisions Permit Litigants To Consent To The Entry Of Final Judgment By A Non-Article III Decisionmaker 9

B. Giving Effect To Litigant Consent In The Present Context Is Consistent With The Framework This Court Developed In *Schor*. 16

II. A PARTY'S CONSENT TO ENTRY OF FINAL JUDGMENT BY A BANKRUPTCY COURT MAY BE EITHER EXPRESS OR IMPLIED 22

III. PETITIONER CONSENTED TO ENTRY OF FINAL JUDGMENT BY THE BANKRUPTCY JUDGE 26

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Buckley v. *Valeo*,
424 U.S. 1 (1976).....16

Canal Corp. v. *Finnman (In re Johnson)*,
960 F.2d 396 (4th Cir. 1992) 23

CFTC v. *Schor*,
478 U.S. 833 (1986).....*passim*

Crowell v. *Benson*,
285 U.S. 22 (1932).....19

Curtis Publishing Co. v. *Butts*,
388 U.S. 130 (1967).....27

Daniels-Head & Assocs. v. *William M. Mercer, Inc. (In re Daniels-Head & Assocs.)*,
819 F.2d 914 (9th Cir. 1987) 14, 24

Galam v. *Carmel (In re Larry's Apartment, LLC)*,
249 F.3d 832 (9th Cir. 2001) 19

Gonzalez v. *United States*,
553 U.S. 242 (2008).....14

Gower v. *Farmers Home Admin. (In re Davis)*,
899 F.2d 1136 (11th Cir. 1990).....9, 25, 30, 31

Granfinanciera, S.A. v. *Nordberg*,
492 U.S. 33 (1989).....8, 28, 29

Heckers v. *Fowler*,
69 U.S. (2 Wall.) 123 (1865) 10, 12

TABLE OF AUTHORITIES—Cont'd

Page(s)

In re TOUSA, Inc.,
680 F.3d 1298 (11th Cir. 2012).....3

Katchen v. *Landy*,
382 U.S. 323 (1966).....6

KHI Liquidation Trust v. *Wisenbaker Builder Servs., Inc. (In re Kimball Hill, Inc.)*,
480 B.R. 894 (Bankr. N.D. Ill. 2012).....5

Kimberly v. *Arms*,
129 U.S. 512 (1889).....10, 11, 12

Langenkamp v. *Culp*,
498 U.S. 42 (1990).....6

MacDonald v. *Plymouth Cnty. Trust Co.*,
286 U.S. 263 (1932).....11

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803).....17

Marshall v. *Stern*,
600 F.3d 1037 (9th Cir. 2010).....30

McFarland v. *Leyh (In re Tex. Gen. Petroleum Corp.)*,
52 F.3d 1330 (5th Cir. 1995).....30

Nat'l Mut. Ins. Co. of D.C. v. *Tidewater Transfer Co., Inc.*,
337 U.S. 582 (1949).....18

Newcomb v. *Wood*,
97 U.S. 581 (1878).....10

Nguyen v. *United States*,
539 U.S. 69 (2003).....17

TABLE OF AUTHORITIES—Cont'd

Page(s)

Nixon v. *Adm'r of Gen. Servs.*,
433 U.S. 425 (1977) 17

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*,
458 U.S. 50 (1982) 11

Official Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc. v. *JP Morgan Chase Bank, N.A.* (*In re M. Fabrikant & Sons, Inc.*),
394 B.R. 721 (Bankr. S.D.N.Y. 2008) 6

Pacemaker Diagnostic Clinic of Am., Inc. v. *Instromedix, Inc.*,
725 F.2d 537 (9th Cir. 1984) 12, 13, 17, 18

Peretz v. *United States*,
501 U.S. 923 (1991) ..... *passim*

Plaut v. *Spendthrift Farm, Inc.*,
514 U.S. 211 (1995) 17

Roell v. *Withrow*,
538 U.S. 580 (2003) 14, 24, 25, 31

S.G. Phillips Constructors, Inc. v. *City of Burlington* (*In re S.G. Phillips Constructors, Inc.*),
45 F.3d 702 (2d Cir. 1995) 25

Stern v. *Marshall*,
131 S. Ct. 2594 (2011) ..... *passim*

Thomas v. *Arn*,
474 U.S. 140 (1985) 23

TABLE OF AUTHORITIES—Cont'd

Page(s)

Thomas v. *Union Carbide Agric. Prods. Co.*,
473 U.S. 568 (1985) 12

United States v. *Garcia*,
848 F.2d 1324 (2d Cir. 1988) 27

United States v. *Levy*,
416 F.3d 1273 (11th Cir. 2005) 22

United States v. *Olano*,
507 U.S. 725 (1993) 22

United States v. *Raddatz*,
447 U.S. 667 (1980) 21

United States v. *Smith*,
402 F.3d 1303 (11th Cir. 2005) 22

United States v. *Woodard*,
387 F.3d 1329 (11th Cir. 2004) 14

Zahn v. *Yucaipa Capital Fund*
(In re Almac's, Inc.),
202 B.R. 648 (D.R.I. 1996) 30

Statutes and Rules

11 U.S.C. § 502(d) 6

11 U.S.C. § 550(a) 2

28 U.S.C. § 151 18

28 U.S.C. § 152(a)(1) 19, 21

28 U.S.C. § 152(e) 19, 21

28 U.S.C § 156 19

28 U.S.C. § 157 ..... 8, 21

TABLE OF AUTHORITIES—Cont'd

Page(s)

28 U.S.C. § 157(a) 19, 21

28 U.S.C. § 157(b)(1) 19

28 U.S.C. § 157(b)(5) 13, 15, 23

28 U.S.C. § 157(c)(2) 13, 21

28 U.S.C. § 157(d) 20

Other Authorities

1 Collier on Bankruptcy (16th ed. rev. 2013) 5

5 Collier on Bankruptcy (16th ed. rev. 2013) 6

H.R. Rep. No. 98-9 (1983) 24

S. Rep. No. 96-74 (1979) 24

S. Rep. No. 98-55 (1983) 18, 24

BRIEF OF THE *TOUSA* LIQUIDATION TRUSTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is the Trustee of the TOUSA Liquidation Trust, plaintiff in *3V Capital Master Fund Ltd.* v. *Official Committee of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, Case No. 10-62035-CIV-Moore (the "*TOUSA* litigation"), the remedial portion of which remains pending in the United States District Court for the Southern District of Florida. The litigation arose from the early 2008 bankruptcy filings of TOUSA, Inc. and its subsidiaries. Shortly before it filed for bankruptcy, TOUSA, Inc. caused certain of those subsidiaries ("the Conveying Subsidiaries") to borrow $500 million, and to grant liens to secure the new debt, in order to resolve claims that other lenders ("the Transeastern Lenders") were asserting against TOUSA, Inc., and for which the Conveying Subsidiaries were not liable. The new borrowing and liens greatly reduced the ability of the Conveying Subsidiaries to repay debts owed to their unsecured creditors. Several months after the bankruptcy filings, the Official Committee of Unsecured Creditors ("the Committee") initiated an adversary

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[1] Petitioner and respondent have filed blanket letters of consent to the participation of *amici curiae*. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or his counsel, has made a monetary contribution to this brief's preparation or submission.

proceeding on behalf of the Conveying Subsidiaries in the United States Bankruptcy Court for the Southern District of Florida. The Committee alleged that the transfer of the liens by the Conveying Subsidiaries to the new lenders was a fraudulent transfer and that the Transeastern Lenders, which were paid with the proceeds of the new loans, should be required to disgorge the money paid to them because they were the entities "for whose benefit" the transfer was made, see 11 U.S.C. § 550(a).

In the bankruptcy court, the Transeastern Lenders failed to raise any objection to the bankruptcy court's authority to enter final judgment on the Committee's claims; indeed, the Transeastern Lenders asserted a counterclaim and third-party claims, which they alleged constituted core proceedings over which the bankruptcy court had jurisdiction. After a thirteen-day trial, the bankruptcy court ruled in favor of the Committee and ordered the Transeastern Lenders to disgorge the money that had been paid out to them.

The Transeastern Lenders appealed to the United States District Court for the Southern District of Florida. They challenged the bankruptcy court's findings on the merits but again said nothing about that court's authority to hear the case. The district court ruled that the Transeastern Lenders were not liable (and that challenges to the remedies ordered by the bankruptcy court were moot in light of that ruling), and the Committee appealed to the Eleventh Circuit. Once again, the Transeastern Lenders' brief said nothing about the bankruptcy court's authority to hear and resolve the Committee's claims. But on November 23, 2011—several months after this Court

decided *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and several months after the completion of the Eleventh Circuit briefing—the Transeastern Lenders submitted a short letter notifying the court of *Stern*. The Eleventh Circuit reversed the district court's judgment on May 15, 2012. *In re TOUSA, Inc.*, 680 F.3d 1298 (11th Cir. 2012). The Eleventh Circuit later denied the Transeastern Lenders' petition for rehearing en banc. No party sought certiorari. The case was remanded to the district court, where it remains pending for review of the remedies the bankruptcy court ordered.

The Transeastern Lenders have now submitted an *amicus* brief in this case, asserting that the "clear" "implication of the *Stern* decision for fraudulent transfer defendants like the Transeastern Lenders" is that they have a "right to Article III adjudication of the claims against them and the bankruptcy court is without authority to enter a final judgment." Br. of Certain *TOUSA* Defendants 2-3. Although the Eleventh Circuit's decision became final long ago when neither the Transeastern Lenders nor anyone else sought certiorari—and therefore cannot be undone regardless of the outcome of the present case—the Transeastern Lenders assert that the Eleventh Circuit "should have" reviewed the district court's *appellate* ruling in the *TOUSA* case "with deference." *Id.* at 3. They are of course wrong about the proper remedy even if the Eleventh Circuit's decision could now somehow be

undone;[2] and it is too late to undo the Eleventh Circuit's decision in any event. But the Transeastern Lenders' effort to gain some advantage from the Court's decision in this case necessitates a response.

For the reasons expressed in this brief, this Court should hold that petitioner Executive Benefits Insurance Agency ("EBIA") effectively consented to adjudication by the bankruptcy court. But important differences between the present case and the *TOUSA* litigation suggest that the Transeastern Lenders had no valid argument against bankruptcy-court adjudication *even if* EBIA prevails in this case. Unlike EBIA, the Transeastern Lenders asserted a counterclaim and third-party claims in the bankruptcy court—which they alleged constituted a core proceeding over which the bankruptcy court had jurisdiction. Unlike EBIA, the Transeastern Lenders never objected to the proceedings in the bankruptcy court, demanded a jury trial, or denied that it was a core proceeding over which the bankruptcy court had jurisdiction. Also unlike EBIA, the Transeastern Lenders affirmatively *told* the district court on appeal to review the bankruptcy judge's factual findings for clear error and never filed a motion to vacate, even after this Court decided *Stern*. Finally, unlike EBIA, the Transeastern Lenders did not ask this Court to hear their case.

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[2] Because the district court never purported to act in a factfinding capacity, the remedy if the bankruptcy court's judgment were somehow wiped out would be a new district court proceeding in which the bankruptcy court's opinion was treated as a report and recommendation, or at most a new trial.

Because the Transeastern Lenders nevertheless seek to align themselves with petitioner, the issues presented by this case are of great importance to *amicus curiae*, who represents a group of lenders that litigated a highly complex proceeding before the bankruptcy court and the district court, and briefed all of the issues before the court of appeals—all before the Transeastern Lenders expressed the slightest objection to the bankruptcy court's authority. *Amicus curiae* has a strong interest in ensuring that the Transeastern Lenders and other parties do not use *Stern* as a vehicle to try to undo their own litigation decisions after the fact.

INTRODUCTION AND SUMMARY OF ARGUMENT

Stern involved state-law tort claims. Both this case and *TOUSA* involved fraudulent transfer claims governed by the Bankruptcy Code. The parties have not asked the Court to decide whether *Stern* extends to fraudulent transfer claims, and *amicus* therefore assumes *arguendo* that, without litigant consent, a bankruptcy court would lack constitutional authority to enter final judgment on a fraudulent transfer claim. Many lower courts have held, however, that bankruptcy courts retain such authority after *Stern*. See, *e.g.*, *KHI Liquidation Trust* v. *Wisenbaker Builder Servs., Inc. (In re Kimball Hill, Inc.)*, 480 B.R. 894, 906-08 (Bankr. N.D. Ill. 2012) (citing additional decisions to the same effect); 1 Collier on Bankruptcy ¶ 3.02[3][b] (16th ed. rev. 2013) ("In *Marathon* and in *Stern* v. *Marshall*, there is considerable language that could lead one to conclude that avoidance actions, which are created by the Bankruptcy Code, can be heard and

determined by a nontenured judge."). It is therefore important at the outset to note that a bankruptcy court's inability to adjudicate fraudulent transfer claims without litigant consent is merely an assumption, not an issue the Court will resolve in this case.[3]

Even on that assumption, the court of appeals correctly held that Article III permits bankruptcy judges to enter final judgment on fraudulent transfer

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[3] Whether *Stern* would have barred the bankruptcy court in the *TOUSA* litigation from entering final judgment is particularly questionable. The Transeastern Lenders' co-defendants in the adversary proceeding—as well as some of the Transeastern Lenders themselves—filed claims against the bankruptcy estate. See *Langenkamp* v. *Culp*, 498 U.S. 42, 45 (1990) (per curiam) (holding that parties that "filed claims against the bankruptcy estate[] thereby [brought] themselves within the equitable jurisdiction of the Bankruptcy Court"); *Katchen* v. *Landy*, 382 U.S. 323, 332 n.9 (1966) ("[H]e who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.") (internal citation omitted); see also 11 U.S.C. § 502(d) (requiring courts to "disallow any claim of any entity from which property is recoverable" because of an avoidable transfer). Moreover, as the fraudulent transfer at issue was made for the Transeastern Lenders' benefit, even the nonclaimant lenders were a necessary party to the adversary proceeding. See, *e.g.*, *Official Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc.* v. *JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 744-75 (Bankr. S.D.N.Y. 2008); 5 Collier on Bankruptcy ¶ 548.11[1][a][i] (16th ed. rev. 2013); cf. *Katchen*, 382 U.S. at 333-34 ("[O]nce it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, it can hardly be doubted that there is also summary jurisdiction to order the return of the preference.").

claims with litigant consent and, further, that petitioner gave such consent in this case.

A long line of this Court's cases, dating back at least to the mid-1800s, has bound litigants to their consensual decisions to refer disputes to non-Article III judges for adjudication. Where litigants have been dissatisfied with a referee or special master's findings and conclusions, this Court has refused to upset the consensual referral retroactively. And more recent cases have held explicitly that the right to an Article III adjudication is a personal, forfeitable one. The Court has thus repeatedly upheld entry of final judgment, with express or implied litigant consent, by bankruptcy judges, magistrate judges, and other officials who lack tenure and salary protection under Article III.

Like these other cases, consensual referral of fraudulent transfer claims to bankruptcy judges is entirely consistent with Article III. This Court held in *CFTC* v. *Schor* that litigants may not consent to adjudication by a non-Article III judge if the adjudication will cause "the encroachment or aggrandizement of one branch at the expense of the other." 478 U.S. 833, 850 (1986) (internal citation omitted). The relevant provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 cause no such encroachment or aggrandizement. To the contrary, the statute merely reallocates authority within the Judicial Branch; it leaves Article III judges with plenary control over the bankruptcy courts' execution of their duties. The Article III courts are responsible for appointing, removing, and paying the expenses of bankruptcy judges. They review bankruptcy judges' legal conclusions de novo.

And 28 U.S.C. § 157 leaves the district courts full control over which cases bankruptcy judges will hear and, indeed, whether bankruptcy judges will hear cases at all. This oversight scheme, which closely mirrors others that this Court has held are consistent with Article III of the Constitution, does not implicate the structural aspects of Article III.

Litigants' consent to entry of judgment by a bankruptcy judge can be either express or implied. In the absence of a clear statutory provision requiring express consent, this Court has consistently held that litigation conduct suffices as consent to non-Article III adjudication. Recognizing implied consent is also consistent with Congress's intent and lessens fairness concerns about "sandbagging."

Finally, petitioner EBIA consented to the bankruptcy court's adjudication of the fraudulent transfer claims at issue in this proceeding. Petitioner concedes that it "registered no objection to the bankruptcy court hearing and deciding the summary judgment motion." Pet. Br. 44. Petitioner seeks relief from that consent on the ground that Ninth Circuit case law foreclosed it from objecting, but this Court found effective consent to action by a non-Article III tribunal in *Peretz* v. *United States*, 501 U.S. 923 (1991), even though Second Circuit case law had foreclosed any objection. To the extent the state of the case law is relevant, petitioner should have been alerted by *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), and cases in lower courts that the issue was debatable. The Transeastern Lenders were even more clearly on notice that the issue was an open one in the Eleventh

Circuit. See *Gower* v. *Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 & n.9 (11th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). In the end, *Stern* itself states the relevant standard: if a litigant "believe[s] that the Bankruptcy Court lack[s] authority to decide his claim," he must "sa[y] so—and sa[y] so promptly." 131 S. Ct. at 2608. Both petitioner and the Transeastern Lenders failed to do so.

ARGUMENT

I. BANKRUPTCY COURTS HAVE CONSTITUTIONAL AUTHORITY TO ENTER FINAL JUDGMENT ON FRAUDULENT TRANSFER CLAIMS WITH THE CONSENT OF THE PARTIES

A. A Long Line Of This Court's Decisions Permit Litigants To Consent To The Entry Of Final Judgment By A Non-Article III Decisionmaker

Petitioner argues at length (Pet. Br. 16-38) that *Stern* limited the authority of bankruptcy courts so stringently that litigant consent (no matter how unequivocal) can *never* be effective to allow bankruptcy-court adjudication of a claim otherwise within *Stern*'s rule. That proposition would represent a radical departure from historical practice that is wholly unwarranted; as this Court observed in *Stern* itself, "our decision today does not change all that much." 131 S. Ct. at 2620.

This Court has long respected litigants' consensual decisions to have non-Article III decisionmakers adjudicate their claims in the first

instance. In *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 133 (1865), for example, litigants agreed to empower a referee to hear their dispute and further agreed that the referee's determination would "have the same force and effect as a judgment of the court." This Court found it uncontroversial that the referee's final judgment, indeed, bound the parties: "[j]udgment having been entered without objection, and pursuant to the order of the court and the agreement of the parties, it [was] not possible to hold that there [was] any error in the record." *Ibid.* The Court also noted that consensual referral of cases to nonjudicial decisionmakers was an ancient practice—"coeval with the organization of our judicial system" and "well known at common law." *Id.* at 128, 131; see also *Newcomb* v. *Wood*, 97 U.S. 581, 583 (1878) ("The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration . . . . In such an agreement there is nothing contrary to law or public policy.").

Likewise, in *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the parties to a contractual dispute agreed to refer their case to a special master. After receiving the special master's decision, the defendants took issue with his factual and legal conclusions and appealed to a federal court. *Id.* at 522-23. The court "refused" to defer to the special master's findings and instead reevaluated the issues itself, "as presented on the pleadings and proofs, without reference to the [master's] report" as anything more than "the careful and well-considered" advice of a lawyer. *Id.* at 523.

This Court reversed, holding that the lower court should not have reviewed the report de novo.

"[W]hen the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, . . . [the master's] determinations are not subject to be set aside and disregarded at the mere discretion of the court." *Id.* at 524. Parties that have agreed to be bound by a non-Article III adjudicator's conclusions must abide by that decision—and for a district court to review the issues anew, without deference to the adjudicator's findings, would be "to defeat . . . the purpose of the reference, and disregard the express stipulation of the parties." *Id.* at 525; see also *MacDonald* v. *Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932) (noting, in a bankruptcy case, that "we can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit [i.e., proceedings before an Article III judge] . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted").

That understanding—that consensual reference of disputes to non-Article III actors is commonplace, and that litigants are thereafter bound by their decisions to refer such disputes—has continued to pervade the Court's case law. Indeed, virtually all of the cases on which petitioner bases its conception of an absolute right to Article III adjudication in fact carve out litigant consent as an express exception to their holdings.

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), one of the primary forebears of *Stern*, certainly did so. This Court has more than once described *Northern Pipeline* as standing for the proposition that "Congress may not

vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (emphasis added), *quoted in Stern* v. *Marshall*, 131 S. Ct. 2594, 2615 (2011); *id.* at 2624 (Breyer, J., dissenting). Likewise, this Court noted in *CFTC* v. *Schor* that *Northern Pipeline* relied on "the absence of consent to an initial adjudication before a non-Article III tribunal . . . as a significant factor in determining that Article III forbade such an adjudication." 478 U.S. 833, 849 (1986) (also citing *Thomas*, 473 U.S. at 584, 591; *Kimberly*, 129 U.S. 512; and *Heckers*, 69 U.S. (2 Wall.) 123).

Northern Pipeline was a landmark decision regarding the assignment of adjudicatory functions to non-Article III judges, but it left this Court's long history of deference to litigant choice in that area undisturbed. Construing *Northern Pipeline* not long after it was decided, then-Judge Kennedy straightforwardly explained that "all the Justices . . . indicated that consent is important to the constitutional analysis." *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 542 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984). Considerations of policy as well as precedent point to that conclusion: "There are compelling reasons for the creation of an infrastructure for determining certain civil cases with the consent of the parties and subject to judicial control." *Id.* at 547.

Petitioner relies heavily on—and quotes selectively from—*Stern*, *Schor*, and *Pacemaker* for the argument that litigants cannot constitutionally consent to the entry of final judgment by a bankruptcy court. But all of those cases relied on findings of litigant consent to *reject* attacks on judgments entered by non-Article III judges. See *Stern*, 131 S. Ct. at 2606-07; *Schor*, 478 U.S. at 857; *Pacemaker*, 725 F.2d at 547.

In particular, *Stern*, although it ultimately accepted an argument that Pierce Marshall had preserved and on that basis held bankruptcy-court adjudication of Vickie Marshall's counterclaim impermissible, first rejected a different argument against bankruptcy-court adjudication of Pierce Marshall's own defamation claim, precisely because "he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary)." 131 S. Ct. at 2608.[4] In reaching that conclusion, the Court repeatedly stated that parties could consent under § 157—the very section of the statute at issue here—to a bankruptcy judge's resolution of their claims. 131 S. Ct. at 2606-07 (holding that 28 U.S.C. § 157(b)(5), which calls for personal injury torts to be "tried in the district court," is not jurisdictional and is therefore waivable); *id.* at 2607 (describing § 157(c)(2) as permitting parties to consent to entry of final

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[4] Pierce argued that, because his defamation claim could not be adjudicated by the bankruptcy court, that court could not adjudicate Vickie's counterclaim either. *Stern*, 131 S. Ct. at 2606. Had the Court agreed, it would not have reached the Article III issue.

judgment by a bankruptcy judge in a non-core proceeding). The Court placed weight on "'the value of waiver and forfeiture rules' in 'complex' cases," where the risk of litigant "'sandbagging'" "can be particularly severe." *Id.* at 2608.

An especially important context in which this Court's respect for litigant consent has been apparent is adjudication by United States magistrate judges. Magistrate judges, like bankruptcy judges, are not subject to Article III's protections. As explained in more detail below, Article III courts' oversight of magistrates is structured very similarly to their oversight of bankruptcy judges.[5] Nonetheless, with litigant consent, magistrate judges can preside over criminal misdemeanor trials, *Gonzalez* v. *United States*, 553 U.S. 242, 252 (2008); enter final judgment on the merits of entire civil proceedings, *Roell* v. *Withrow*, 538 U.S. 580 (2003); and oversee felony jury selection, *Peretz* v. *United States*, 501 U.S. 923, 937 (1991). The lower courts have authorized magistrate judges to accept guilty pleas and adjudicate defendants guilty. See *United States* v. *Woodard*, 387 F.3d 1329, 1331 (11th Cir. 2004) (noting that "every circuit to have examined these issues" agreed that the practice was consistent with Article III), *cert. denied*, 543 U.S. 1176 (2005). To hold that litigants could not consent to adjudication of their claims by a bankruptcy judge

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[5] Congress apparently emulated the Federal Magistrates Act when it redesigned the bankruptcy system after *Northern Pipeline*. See *Daniels-Head & Assocs.* v. *William M. Mercer, Inc. (In re Daniels-Head & Assocs.)*, 819 F.2d 914, 918 (9th Cir. 1987).

would conflict with a chain of precedents in a context that is nearly indistinguishable from this one.

Seeking nevertheless to distinguish magistrate-judge adjudication from bankruptcy-court adjudication, petitioner contends that the Constitution might permit litigants to consent to non-Article III adjudication, but "only insofar as Congress included a *statutory* requirement of consent." Pet. Br. 28. That argument is flawed for at least two reasons.

First, this Court has upheld consensual non-Article III adjudications even where the applicable statutes said nothing whatsoever about consent. In *Stern*, 131 S. Ct. at 2606-08, as discussed earlier, this Court held that Pierce Marshall consented to bankruptcy-court adjudication of his defamation claim, but the relevant statutory provision, 28 U.S.C. § 157(b)(5), did not mention consent. In *Peretz*, 501 U.S. at 927-28, 942, this Court held that it did not violate Article III for a magistrate judge to preside over criminal jury selection with the defendant's consent, where the statute stated merely that a magistrate could "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Second, there is no reason to think that including a statutory consent provision is what ensures that a non-Article III court's "error will be correctable on appeal" if it proceeds without consent. Pet. Br. 34-35. To the contrary, if this Court said litigant consent was required, non-Article III adjudication without consent would be correctable on appeal, statute or not.

In light of all of these precedents, petitioner swims upstream in trying to deny the relevance of litigant consent in deciding whether an adjudication violates Article III. Petitioner nevertheless assigns talismanic significance to *CFTC* v. *Schor*, which according to petitioner must be read together with *Stern* to hold that any restriction on bankruptcy courts' adjudicative authority implicates the separation of powers and is for that reason non-waivable. Pet. Br. 25-27. We therefore next examine the framework established by that decision.

B. Giving Effect To Litigant Consent In The Present Context Is Consistent With The Framework This Court Developed In *Schor*

In *Schor*, this Court held that it did not violate Article III for the Commodity Futures Trading Commission to assume jurisdiction over common law counterclaims against a party that had waived any objection to adjudication of those claims by the Commission. 478 U.S. at 847-58. First, the Court held that in general "Article III's guarantee of an impartial and independent federal adjudication" is "a personal right" and "is subject to waiver." *Id.* at 848. Second, the Court rejected the argument that the case fell within a category of cases involving structural principles not subject to "cure" by litigant consent. *Id.* at 850-57. The Court identified the kind of case that implicates Article III's non-consentable structural underpinnings as one in which the vesting of adjudicatory power in a non-Article III actor causes "'the encroachment or aggrandizement of one branch at the expense of the other.'" *Id.* at 850 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per

curiam)); see also *Pacemaker*, 725 F.2d at 544 ("The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system.") (citing *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).[6]

The statutory provision at issue in bankruptcy cases involving alleged fraudulent transfers is not within the category *Schor* identified as problematic. It poses no risk of encroachment of the functions of the Judicial Branch or aggrandizement of the role of another Branch.

The text, structure, and legislative history of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Act") make readily apparent that

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[6] The *Schor* paradigm does not necessarily prevent litigants from waiving or forfeiting even structural rights. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the 'judicial Power' to disregard an unconstitutional statute, see *Marbury* [v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)]; yet none would suggest that a litigant may never waive the defense that a statute is unconstitutional."); see also *Nguyen* v. *United States*, 539 U.S. 69, 88-89 (2003) (Rehnquist, C.J., dissenting) (concluding that criminal defendants had "forfeited" their argument that the participation of a non-Article III judge on a Ninth Circuit panel violated "the structural guarantees embodied in Article III"). The majority in *Nguyen* decided the case on statutory grounds and thus did not address this issue. See *Nguyen*, 539 U.S. at 74-76.

Congress did not enact that law "'for the purpose of emasculating'" Article III courts. *Schor*, 478 U.S. at 850 (quoting *Nat'l Mut. Ins. Co. of D.C.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, 644 (1949)). To the contrary, one of Congress's primary objectives was to give the Article III judiciary as much control as possible over the bankruptcy courts, while still allowing it the benefits of sharing its caseload with specialized judicial officers. See, *e.g.*, S. Rep. No. 98-55, at 16 (1983) (explaining that the bill that became the 1984 Act was designed to "give[] the district court far greater control over the handling of all bankruptcy cases and proceedings" than did the law that this Court invalidated in *Northern Pipeline*). And, true to Congress's intention, the 1984 Act, like the Federal Magistrates Act, leaves the Article III courts with "continuing, plenary responsibility for the administration of the judicial business of the United States." *Pacemaker*, 725 F.2d at 546.

The 1984 Act makes bankruptcy judges "unit[s]" and "officer[s]" of the district court. 28 U.S.C. § 151. Bankruptcy judges are appointed and subject to removal by the Article III judges of their circuits.[7]

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[7] *Stern* rejected this as a basis for finding that bankruptcy courts were a "mere 'adjunct'" to district courts. See 131 S. Ct. at 2619. However, the Court in *Stern* was addressing whether bankruptcy courts were exercising judicial power, a wholly different question from that currently before the Court: whether, for consentability purposes, one branch of government is "encroaching" on another. In conducting the latter analysis, this Court has considered the source of an official's appointment. See, *e.g.*, *Peretz*, 501 U.S. at 937 (finding relevant, for purposes of *Schor*'s "encroachment" inquiry, the fact that

Id. § 152(a)(1), (e). Their salaries track those of Article III judges, and the federal judiciary pays their work expenses. *Id.* § 156. District courts review bankruptcy judges' legal conclusions de novo. See, *e.g.*, *Galam* v. *Carmel (In re Larry's Apartment, LLC)*, 249 F.3d 832, 836 (9th Cir. 2001); cf. *Crowell* v. *Benson*, 285 U.S. 22, 51-54 (1932) (emphasizing, in upholding administrative adjudication of a workers' compensation award, that Article III courts reviewed the agency's legal conclusions de novo).

Importantly, the approval of an Article III judge is a necessary precondition to a bankruptcy court's taking any action whatsoever; the 1984 Act gives district courts absolute control over whether, and to what extent, bankruptcy judges participate in bankruptcy proceedings. Under 28 U.S.C. § 157(a), "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Applying that statutory language, the judges of a district court could opt to refer all bankruptcy proceedings automatically to bankruptcy judges for initial adjudication, or they could choose never to refer any such proceedings; Congress has left either alternative, or anything in between, open to the courts. See also *id.* § 157(b)(1) (conditioning bankruptcy judges' power to "hear and determine . . . cases" on district court referral under § 157(a)).

"[m]agistrates are appointed and subject to removal by Article III judges").

Likewise, a district court can, on the motion of a party or sua sponte, reassert direct control at any time over a case it has previously referred to a bankruptcy judge. See *id.* § 157(d). If the district courts became dissatisfied with bankruptcy judges' execution of their duties, they could simply stop allowing them to hear cases. There is no threat of the encroachment or aggrandizement of one branch at the expense of another—the characteristic *Schor* identified, 478 U.S. at 850, as taking a case out of the usual rule that Article III rights are personal rights subject to waiver or forfeiture.

As mentioned above, this scheme closely resembles the balance of power that Congress designed—and this Court has repeatedly approved—to govern magistrate judges' participation in judicial proceedings with litigant consent. Indeed, the same factors on which the Court has relied in its magistrate cases are equally present here.

For example, *Peretz* v. *United States*, 501 U.S. 923 (1991), held that Article III permitted a magistrate judge to preside, with the defendant's consent, over jury selection in a felony trial. Citing *Schor*, 478 U.S. at 848, the Court first noted: "We have previously held that litigants may waive their *personal right* to have an Article III judge preside over a civil trial." *Id.* at 936 (emphasis added). Applying the rest of *Schor*'s framework, the Court concluded that such participation by a magistrate judge—who lacks Article III salary and tenure protections—did not implicate "structural protections provided by Article III." *Id.* at 937. The Court noted first that "[m]agistrates are appointed and subject to removal by Article III judges." *Ibid.* The same is

true in the bankruptcy context. See 28 U.S.C. § 152(a)(1), (e). Moreover (and again paralleling the bankruptcy system, see 28 U.S.C. § 157(a)), "[t]he 'ultimate decision' whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties." *Peretz*, 501 U.S. at 937 (quoting *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980)). Because the district court had plenary control of the process, the Court perceived "no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts." *Ibid.* (internal quotations and alterations omitted). Parallel considerations apply here, where Article III courts' control over the bankruptcy courts take this case out of any category that could possibly involve the kind of threats to the Judicial Branch that make consent ineffective.

The conclusion that litigants can validly consent to a bankruptcy judge's entry of final judgment on a fraudulent transfer claim is wholly consistent with this Court's decision in *Schor*. The "allocat[ion]" in 28 U.S.C. § 157 of "authority to enter final judgment between the bankruptcy court and the district court . . . does not implicate questions of subject matter jurisdiction." *Stern*, 131 S. Ct. at 2607. Nor does it implicate the structural concerns that partially underlie Article III, § 1 of the Constitution. To the contrary, it implicates "primarily personal" interests, *Schor*, 478 U.S. at 848, and litigants may by consent forgo any right to initial adjudication of their bankruptcy claims by an Article III judge, see *Stern*, 131 S. Ct. at 2607 (noting that § 157(c)(2) permits parties to "consent to entry of final judgment

by bankruptcy judge in [a] non-core case," and questioning why a neighboring provision "may not be similarly waived").

For all of these reasons, bankruptcy courts' consensual adjudication of fraudulent transfer claims does not implicate the structural values underlying Article III. It fits easily into the framework this Court developed in *Schor*.

II. A PARTY'S CONSENT TO ENTRY OF FINAL JUDGMENT BY A BANKRUPTCY COURT MAY BE EITHER EXPRESS OR IMPLIED

In litigation, consent to a tribunal's exercise of authority can come in many forms. This Court's precedents and other relevant considerations demonstrate that implied consent can be just as effective as express consent.[8]

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[8] Failure to raise an issue in a timely fashion can constitute implied consent, but also can preclude later assertion of the issue under the separate doctrine of forfeiture. See *Stern*, 131 S. Ct. at 2608 ("Given Pierce's course of conduct before the Bankruptcy Court, we concluded that he consented to that court's resolution of his defamation claim (*and forfeited any argument to the contrary*).") (emphasis added). This Court has, of course, repeatedly held that even constitutional defenses bearing on important rights are subject to forfeiture. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 732 (1993). In the Eleventh Circuit, the doctrine of forfeiture is applied strictly. A litigant forfeits any argument he fails to raise in his opening brief, even if the claim was "squarely foreclosed by [Eleventh Circuit] precedent at the time his opening brief was filed," *United States* v. *Smith*, 402 F.3d 1303, 1309-10 (11th Cir. 2005), and even if a relevant Supreme Court decision was issued after he submitted the brief, see *United States* v. *Levy*, 416 F.3d 1273, 1275-79 (11th Cir. 2005). In the *TOUSA*

First, in the absence of a clear statutory command that consent be express, this Court has accepted litigant conduct as a manifestation of consent to non-Article III adjudication. In *Schor*, for example, the Court noted that implied consent—in the form of a decision to seek relief through an administrative proceeding, rather than through a lawsuit in state or federal court—"constituted an effective waiver." 478 U.S. at 849. Likewise, *Stern* relied on Pierce Marshall's "course of conduct before the Bankruptcy Court" to conclude that he had waived his right under 28 U.S.C. § 157(b)(5) to adjudication of his defamation claim (and any counterclaim) before a district judge. 131 S. Ct. at 2607-08. In *Thomas* v. *Arn*, 474 U.S. 140 (1985), the Court approved a Sixth Circuit rule that a litigant would forfeit his right to any Article III review whatsoever of a magistrate judge's findings and conclusions if he did not timely object to them. And the substantial majority of courts agree that implied consent, in the form of "failure to make a timely objection" to proceedings before the bankruptcy judge, authorizes a bankruptcy court to enter final judgment in non-core proceedings. *Canal Corp.* v. *Finnman (In re Johnson)*, 960 F.2d 396, 403 (4th Cir. 1992) (surveying authorities); see also, *e.g.*, *Stern*, 131 S. Ct. at 2606 (referring to a party's ability to "waive *or forfeit* an objection to the bankruptcy court

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litigation, the Transeastern Lenders forfeited their ability to raise a challenge to the bankruptcy's court's authority to adjudicate the fraudulent transfer issue, even if their failure to raise the issue in the lower courts is not construed to be "consent."

finally resolving a non-core claim") (emphasis added); *In re Daniels-Head*, 819 F.2d at 918-19 ("The fact that Congress failed to include any provision for explicit consent in the 1984 Act indicates that consent implied from the parties' actions is sufficient.").

Giving effect to implied consent is also consistent with the legislative intent underlying the 1984 Act. In *Roell*, this Court found in the legislative history of the Federal Magistrates Act "a good pragmatic reason to think that Congress intended to permit implied consent" when it authorized magistrates to enter judgment in civil matters with litigants' sanction: Congress's expressed desire to reduce the backlog of pending civil cases and "thereby 'improve access to the courts for all groups.'" 538 U.S. at 588 (quoting S. Rep. No. 96-74, at 4 (1979)). Just so here. In its deliberations on the 1984 Act, Congress focused on "the crucial need for speed in bankruptcy cases and the district court's historical lack of interest in and neglect of bankruptcy cases," along with "the volume of bankruptcy cases and the need for expedition in [those] cases." H.R. Rep. No. 98-9, at 7-8 (1983). The Senate Report explained that the bill that became the 1984 Act gives "the parties themselves" "greater control . . . to determine the forum" in which their claims will be litigated; a party "may . . . consent to a bankruptcy judge" handling non-core proceedings "*and does so by not moving to have that proceeding recalled.*" S. Rep. No. 98-55, at

17 (1983) (emphasis added).[9] Demanding a formal expression of consent where the statute includes no such requirement would contravene Congress's will.

Finally, to hold that parties can impliedly consent to bankruptcy court adjudication is superior as a matter of fairness. "Inferring consent in these circumstances . . . checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the [bankruptcy] judge's authority." *Roell*, 538 U.S. at 590. This case exemplifies the concerns this Court has frequently expressed regarding litigant "sandbagging." It would be acutely unfair to let a party litigate an entire proceeding without objection, through multiple levels of judicial review, and then, after he loses on the merits, finally take from his back pocket a challenge to the bankruptcy judge's authority. The unfairness would be particularly serious in *TOUSA*, where longstanding circuit case law had highlighted the question of bankruptcy court authority since well before the *TOUSA* case was even filed. See *Gower* v. *Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 & n.9 (11th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). Litigants like EBIA and the Transeastern Lenders should not be permitted to take a second shot at cases they lose on the merits by challenging bankruptcy judges' authority only after

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[9] See also *S.G. Phillips Constructors, Inc.* v. *City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702, 705 (2d Cir. 1995) (explaining that when it passed the 1984 Act "Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings").

they lose. Cf. *Stern*, 131 S. Ct. at 2608 ("Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.").

III. PETITIONER CONSENTED TO ENTRY OF FINAL JUDGMENT BY THE BANKRUPTCY JUDGE

This case (unlike the *TOUSA* litigation, which went to trial) was decided on summary judgment. Petitioner acknowledges that it "registered no objection to the bankruptcy court hearing and deciding the summary judgment motion." Pet. Br. 44. The existence of consent is therefore quite clear. Petitioner seeks reversal not on the ground that consent did not exist, but on the ground that petitioner should be relieved from the consequences of that consent because of the state of the case law existing in the circuit when petitioner gave its consent. *Ibid.*[10]

This Court has not been hospitable to such arguments. In *Peretz*, at the time the case was tried, the Second Circuit had held that a magistrate judge was authorized to conduct felony *voir dire* even if the

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[10] The Transeastern Lenders go further than petitioner. In their *amicus* brief, they assert that the failure to object to adjudication by a non-Article III court cannot be deemed consent to such adjudication unless "the outcome" of a case not yet decided (such as *Stern* at the time of trial in the *TOUSA* litigation) "was so inevitable that any prudent litigant should have anticipated it." Br. of Certain *TOUSA* Defendants 13. Such a standard is tantamount to saying that litigants are excused from raising any argument unless they are guaranteed to win. That cannot be the correct standard.

defendant objected. *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez* v. *United States*, 490 U.S. 858 (1989), *cited in Peretz*, 501 U.S. at 954 (Scalia, J., dissenting). When *Peretz* (which came from the Second Circuit) was reviewed, however, this Court readily concluded that "[t]his case differs from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it." 501 U.S. at 932. The Court did not pause to consider whether the petitioner in that case would have had any basis in the case law for objecting. So too here, it is petitioner EBIA's consent, not the reasons for such consent, that matters.[11]

To the extent that the state of the case law at the time of a litigant's consent is relevant, there is significant reason to believe that petitioner EBIA should have been on notice that the argument it did

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[11] Both petitioner EBIA (Pet. Br. 42) and *amicus* Transeastern Lenders (Br. of Certain *TOUSA* Defendants 5, 13) cite as contrary authority *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), but that case is very different. It did not involve consent or objection to proceeding before a particular tribunal. Instead, it involved First Amendment defenses raised in libel litigation. At the time of trial, at least four of *this Court's* cases "indicat[ed] that civil libel actions were immune from general constitutional scrutiny." 388 U.S. at 143-144 & n.8 (opinion of Harlan, J.). This Court's willingness to allow a litigant to make "prompt" presentation of a constitutional argument (*id.* at 145)—after a decision of this Court opens up an entire line of argumentation that this Court had previously foreclosed—is a far cry from allowing a litigant to consent to adjudication before a tribunal and later challenge its consent on the ground that circuit precedent would have made such a challenge difficult to win.

not raise had a chance of success—and *ample* reason for the Transeastern Lenders to have been on such notice in the *TOUSA* litigation. *Amicus* will discuss the precedents confronting the litigants in both cases.

Even today, it is not clear (and this Court is not being asked to decide) whether *Stern* extends to cases of alleged fraudulent transfers. See pp. 5-6 & note 3, *supra*. The argument for extending *Stern* from the state-law counterclaims at issue there to fraudulent transfer claims under the Bankruptcy Code, however, is based entirely on this Court's 24-year-old decision in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989). In that case, the Court held that the petitioners, defendants in the fraudulent transfer action, had a Seventh Amendment right to a jury trial. The Court focused on the same distinction between "private rights" and "public rights" that had featured in its *Northern Pipeline* decision concerning the limits of adjudicatory authority for non-Article III courts. 492 U.S. at 51-55. The Court held that the right to recover a fraudulent conveyance in bankruptcy is "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55.

Although the ultimate merits of the argument remain debatable to this day, *Granfinanciera* clearly flagged the Article III issues surrounding bankruptcy courts' adjudication of fraudulent transfer claims. The Court in *Granfinanciera* also remarked that its "decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment

permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. Given that the Court's answer to the first question seemed to be no, litigants who were truly unhappy to be in bankruptcy court had reason to raise the issue there.

Sure enough, both petitioner EBIA and the Transeastern Lenders leaned heavily on *Granfinanciera* when they eventually, belatedly, challenged their respective bankruptcy courts' authority. Long before *Stern*, EBIA relied on *Granfinanciera* in its motion to vacate the bankruptcy court trial date. In the *TOUSA* litigation, the Transeastern Lenders expressed how clearly they thought *Granfinanciera* had flagged the issue. See Petition for Rehearing En Banc of Appellees Transeastern Lenders at 4, *Senior Transeastern Lenders* v. *Official Comm. of Unsecured Creditors (In re TOUSA, Inc.)*, 680 F.3d 1298 (11th Cir. 2012) (No. 11-11071) (contending that *Granfinanciera* "held that a fraudulent transfer action against a non-creditor does not fall within the doctrine allowing 'legislative' courts to resolve cases involving public rights"); *id.* at 5 ("The [*Stern*] Court . . . concluded that the common law tort claim, *like the fraudulent transfer claim at issue in Granfinanciera*, was 'the very type of claim that . . . must be decided by an Article III court.'") (quoting *Stern*, 131 S. Ct. at 2616) (emphasis added). As EBIA's and the Transeastern Lenders' own arguments show, *Granfinanciera* provided ample

notice that Article III might limit bankruptcy judges' authority.

If EBIA or the Transeastern Lenders needed further assurance, however, they could have looked to courts around the country, some of which had squarely held that bankruptcy courts lacked authority to enter final judgment on fraudulent transfer claims. See, *e.g.*, *McFarland* v. *Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1336-37 (5th Cir. 1995) (holding that a fraudulent transfer litigant has a waivable Article III right to a district court trial); *Zahn* v. *Yucaipa Capital Fund (In re Almac's, Inc.)*, 202 B.R. 648, 659 (D.R.I. 1996) (concluding, based on *Granfinanciera* and other cases, "that the power to enter a final decision over [avoidance claims in bankruptcy] must rest with an Article III tribunal"). Many other courts had flagged the issue as a close one. In fact, Eleventh Circuit precedent, which governed the *TOUSA* litigation, explicitly questioned whether bankruptcy courts could enter final judgment on fraudulent transfer claims in the absence of litigant consent. See *In re Davis*, 899 F.2d at 1140 & n.9. Nonetheless, the Transeastern Lenders made no objection.

Early in the *EBIA* and *TOUSA* litigation, the Ninth Circuit's opinion in *Marshall* v. *Stern*, 600 F.3d 1037 (9th Cir. 2010), further increased the issue's salience. Although the Ninth Circuit's reasoning did not match this Court's, the Ninth Circuit's focus on the demands of Article III and the end result it reached—that the bankruptcy court lacked authority to enter final judgment on a claim despite the claim's statutory designation as "core"—signaled that the issue was subject to challenge. But

even then, neither EBIA nor the Transeastern Lenders raised the issue.

As for conduct constituting consent to litigate in the bankruptcy court notwithstanding that notice, all that is required (in the absence of a statutory provision requiring otherwise) is appearance before the bankruptcy judge "without expressing any reservation" regarding litigation there. *Roell*, 538 U.S. at 586; see also *Schor*, 478 U.S. at 849 ("Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver.").

Both petitioner and the Transeastern Lenders easily meet this standard. The *TOUSA* litigation provides a particularly dramatic example: Despite all of the signals that bankruptcy courts' authority was open to challenge, and despite Eleventh Circuit case law explicitly advising the Transeastern Lenders that they might not have to litigate in bankruptcy court, see *In re Davis*, 899 F.2d 1136, they readily argued their case—and even asserted a counterclaim and third-party claims—there. They did not deny the Committee's allegations that it was a core proceeding over which the bankruptcy court had jurisdiction, and, in connection with the counterclaim and third-party claims, they affirmatively alleged that it *was* such a proceeding. They argued for application of the clear-error standard on appeal to the district court, and they notified the Eleventh Circuit of *Stern* only in a letter submitted five months after this Court issued its decision. In fact, they have scarcely mentioned *Stern* even in their now-pending briefs to the district court on remand. *Stern* itself states the

consequences of a failure to object to the adjudicatory authority of a bankruptcy court: if a litigant "believe[s] that the Bankruptcy Court lack[s] authority to decide his claim," he must "sa[y] so—and sa[y] so promptly." 131 S. Ct. at 2608. Litigating one's case without objection, as both the Transeastern Lenders and EBIA did, falls far short of that requirement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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